INDEX.

PAGE.

Preliminary Statement..... 2

I

Statement of Prior Proceedings in this cause.... 3

II

Abstract of Pleadings..... 5

III

Chronological Statement of Facts..... 10

IV

Statement of the Case required by Rule 21..... 14

V

Statement of questions and issues as presented by the petition for the writ of certiorari..... 15

VI

Specification of Errors..... 19

Brief of the Argument..... 28

Point I.

PAGE.

THE RULINGS BY THE TRIAL COURT WHICH WERE AFFIRMED BY THE CIRCUIT COURT OF APPEALS WERE BASED UPON THE THEORY THAT THE TRIAL COURT UNDER THE MANDATE OF THIS COURT COULD ONLY CONSIDER THE QUESTION OF THE LEGAL EFFECT OF THE CONDUCT OF THE PLAINTIFFS THEMSELVES, AND THAT THIS COURT HAD DECIDED THAT IN THE HILL CASE THE NEW YORK STATUTE GOVERNED. THIS WAS CLEARLY ERRONEOUS... ... 28

Point II.

THE PREMIUM NOTICE STATUTE OF NEW YORK DOES NOT UNDER THE CIRCUMSTANCES PRESENTED CONTROL, AND THE RIGHTS OF THE PARTIES ARE MEASURED ALONE BY THE TERMS OF THE CONTRACT. THE PREMIUM FALLING DUE IN 1887 NOT HAVING BEEN PAID, THE INSURANCE, $20,000, IS NOT COLLECTIBLE (COHEN CASE, 179 U. S., 270)..... 39

The special clause in the Hill policy respecting the making of the contract was not *intended* to and *did not* put the New York Premium Notice Statute in operation in Washington, so as to govern the collection of the Hill premiums there, and this clearly appears from the following considerations:

(1.) There is no express reference in the policy to, or any incorporation therein of the premium notice statute as governing the parties, except to waive it..... 42

PAGE.

(2.) Such an intent to make the premium notice statute govern would be inconsistent with the clause in the policy expressly waiving any statutory notice..... 42

If Mr. Warburton claims that the waiver is invalid under the laws of New York, then the very fact that the stipulation as to waiver was introduced into the policy is cogent evidence of the intention that the New York statute should not govern, on the principle that when a contract is open to two constructions, the one lawful and the other unlawful, the former must be adopted.

(3.) The claim of the plaintiffs involves the finding of an express intent to make the New York notice statute which has no extra-territorial operation, operate extra-territorially, by agreement, the effect of which would be to change the statute by agreement. This intent is baseless and unreasonable. The statute is drawn with reference to New York business alone..... 42

(4.) The Baxter application and policy *were not similar* to the Hill application and policy, since the special clause in the Baxter policy had the words therein "and to be executed" and the application and policy were otherwise different also.... 42

(5.) *The special clause* covers primarily Laws of New York as to declarations, agreement and warranties in the application, and the legal situation is the same in this respect as in the Cohen case..... 42

(6.) Even if the policy had been actually made in the City of New York the notice statutes would not have operated upon the business of collecting its premiums in the State of Washington, even if

PAGE.

also it had not been waived. Part performance of the contract was to be in Washington, namely, payment of premiums..... 42

(7.) The intent of the parties, that the premium notice statute should not govern is still further indicated by the application of the *lex loci solutionis*, as the place of past performance in respect to the matter which is in dispute, the payment of premiums was in Washington and not in the State of New York..... 65

Point III.

EVEN IF THE NEW YORK STATUTE DOES CONTROL, THE CHILDREN OF HILL, BENEFICIARIES IN THE POLICY, ARE CONCLUDED BY THE FAILURE TO PAY THE PREMIUMS—HILL HAVING HAD THE EQUIVALENT OF STATUTORY NOTICE AND WAIVED THE SAME..... 76

(1.) The opposing claim is that if the premium notice statute governs then the children can recover because the Cohen case has so decided, but no such point was either discussed or decided in the Cohen case..... 77

(2.) Hill failed to pay the premium after actual notice to him, and abandoned the contract.

Such non-payment by Hill terminated the contract as against the children, as no one else on their behalf performed the necessary condition of payment..... 79

PAGE.

Actual knowledge by the insured of the premium being due possessed and acted upon by Hill and actual dealings respecting the payment of the premium was equivalent to serving the statutory notice if required at all in this case 86

(3.) There was no obligation on the part of Hill to pay premiums longer than he wished, and the beneficiaries had no contract right to require the insured to make payment 96

The insurance company by the contract and the statute, if applicable, dealt solely with the insured. If the insured failed or refused to make a payment at the due date, the contract was determined unless the beneficiaries or someone in in their behalf stepped forward and paid 96

(4.) Even if the statute otherwise would control, still the statutory notice was waived not only by special agreement in the policy, but also by Hill, the statutory agent to receive the notice, in that he received actual notice and did not insist upon the technical statutory notice 106

This notice statute was one which could be waived 107

None of the decided cases holding that this statute cannot be expressly waived, are either well considered or binding upon this Court 120

No one paid on behalf of the children..... 128

Point IV.

PAGE.

EVEN IF THE NEW YORK STATUTE CONTROLS, IT WAS NOT THE INTENTION OF THE NEW YORK LEGISLATURE TO KEEP THE POLICY ALIVE, AND ITS PROVISIONS UNIMPAIRED, NOTWITHSTANDING SUCCESSIVE DEFAULTS TO PAY THE PREMIUM AND THE ABANDONMENT OF THE CONTRACT..... 135

This would be an inequitable construction of the statute 135

A.

The intention to preserve the contracts only for a year, is clearly shown by the Amendment of 1897. 139

B.

The notice in Statute of 1877 referred to forfeiture of premiums already paid on policies, or the reserve thereon and to nothing else..... 142

Appendix.

A.—Opinion of the Supreme Court of the United States in Hill case, 178 U. S 347..... 153

B.—Opinion of the Supreme Court, State of Washington, Lone, Admr., *vs.* Mutual Life..... 154

C.—New York Premium Notice Statutes..... ... 159

In the Supreme Court of the United States,

OCTOBER TERM, 1903.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Plaintiff in Error,

vs.

ELIZA MAUD HILL, GEORGE E. HILL, ELLEN KELLOGG HILL and EUGENE C. HILL, by his Guardian, EBEN SMITH,
Defendants in Error.

No. 166.

On Writ of Error to the United States Court of Appeals for the Ninth Circuit. In error to the Circuit Court for the District of Washington, Northern Division.

Brief of the Mutual Life Insurance Company of New York, Plaintiff in Error.

Desinit debitor esse is qui nactus est exceptionem justam nec ab æquitate naturali abhorrentem.—MARCELLUS.

(He is no longer a debtor who has a defence that is righteous and consistent with natural equity).

PRELIMINARY STATEMENT.

There is no substantial difference between this case and the Cohen case (179 U. S., 363) so far as the premium notice statute of New York is concerned, so that the Plaintiff in Error claims that this case is disposed of in its favor by the Cohen case. The Circuit Court of Appeals in the Ninth Circuit did follow the Cohen case in Mutual Life *vs.* Hathaway, 106 Fed., 815, but refused to follow it in this case, and Chief Justice Holmes, now of this Court, followed the main principle of the Cohen case in Johnson *vs.* Mutual Life, 180 Mass., 407. The broadminded views of this Court have won over the Supreme Court of Washington. See Lone case in appendix to this brief; and in another case in the State of Washington, where claims such as these first originated, its Supreme Court said "the plaintiff has no "equities in this case, and, if he recovers at all, it must "be upon his strict legal rights. We think such rights "have not been shown, under the facts proven, and "that he has no just or legal demand against the ap-"pellant" (55 Pac. Rep., 429). In addition to the above point, however, the question of the effect under the New York statute of the failure to pay after actual notice to Hill and the abandonment of the contract may arise from the facts proved herein. The propositions involved in the case can be ultimately resolved into two simple contentions. No premiums having been paid after the first, the policy by its express provisions terminated, unless the non-payment was excusable. It was excusable, the plaintiff says, because no statutory notice was sent; but the Company claims no statutory notice was necessary; but if so, the insured who was the plaintiff's statutory agent had actual notice, did not pay, abandoned the policy, and no one else paid in their behalf.

Previous opinions in this case have been reported as follows:

Mutual Life *vs.* Hill, 97 Fed. Rep., 263 (Oct. 1899), Opinion of Circuit Court of Appeals prior to decision of this Court in Phinney, Sears, Allen and this case.

Mutual Life *vs.* Hill, 178 U. S., 347, Opinion of this Court prior to opinion in Cohen case.

Hill *vs.* Mutual Life, 113 Fed. Rep., 44 (Jan. 1902), Opinion by Hanford J. on retrial. See Record, p. 53.

Mutual Life *vs.* Hill, 118 Fed. Rep., 708. (Oct. 1902), Opinion by Circuit Court Appeals after retrial. See Record, p. 196.

I.

Statement of Prior Proceedings in this cause.

This action was commenced in the United States Circuit Court for the District of Washington, Northern Division, on the 19th day of October, 1895, to recover the sum of twenty thousand dollars ($20,000), with interest from January 3rd, 1891 (amount of principal and interest now about $32,000), claimed to be due on a policy of life insurance issued in 1886 by The Mutual Life Insurance Company of New York (Rec., 2, 9) and which was abandoned in 1887.

The answer was demurred to by the plaintiff and the Court sustained the demurrer to the answer and ordered

judgment for the plaintiff Hill in the sum of $24.086.80 (Rec., 22).

No opinion was rendered by Hanford, J., in sustaining the demurrer and ordering payment.

To reverse this judgment the defendant company sued out a writ of error to the United States Circuit Court of Appeals for the Ninth District.

For opinion of affirmance by Circuit Court of Appeals by Hawley, District Judge, concurred in by Gilbert & Ross, Judges, see 97 Federal Reporter, page 265.

In 1899, a petition for a writ of certiorari was filed by the defendant company in this Court.

Writ of certiorari was thereafter granted by this Court Feb. 5, 1900, and filed.

The cause was heard by this Court at the same time as the Phinney, Sears, Allen and Cohen cases in March, 1900, and is reported in 178 U. S., 347. A copy of the opinion of this Court is annexed to this brief as Exhibit A appendix. The cause was retried on the facts September, 1901, before Hanford, J. and a verdict rendered for the plaintiff, on which judgment was entered for $29,020.

Subsequently a motion was made for judgment in favor of the defendant *non obstante veredicto*, which motion was denied, and an opinion denying such motion was filed (by Hanford, J.) on January 23rd, 1902 (Rec., 53).

To reverse this judgment the defendant Company sued out a writ of error in the Circuit Court of Appeals, Ninth Circuit, and judgment was there affirmed (Rec., 206).

The opinion of the Circuit Court of Appeals will be found at page 201 of the Record. It is also reported in 118 Fed. Rep., 708.

In January 1903 a petition for a writ of certiorari was filed with this Court.

Writ of certiorari was thereafter granted by this Court, and the cause now comes before this Court on the writ of certiorari for hearing on the merits.

II.

Abstract of Pleadings.

AMENDED COMPLAINT:

The complaint in this action alleges that on the 29th day of April, 1886, the defendant company executed and delivered in the City of New York the policy in question for $20,000 and that the application for the said policy contained the following agreement:

> "And it is agreed that there shall be no contract "of insurance until a policy shall have been de- "livered and issued by said company, and the first "premium thereon paid while the person proposed "for insurance is in the same condition of health "described in this application, and that if said "policy be issued the declarations, agreements and "warranties herein contained shall be a part "thereof; *and the contract of insurance when "made shall be held and construed at all times "and places to have been made in the City of New "York*" (Record, page 8).

The above clause is made by the defendants in error, the bone of contention in this case.

That the policy was in favor of Hill's wife, if living, and if not, their children. That the wife predeceased Hill before 29th day of April, 1887. That the plaintiffs are their children.

That on the 4th day of December, 1890, George Dana Hill, the insured, died. That the said Hill during his

lifetime duly performed all the conditions of the contract (Rec., p. 11).

AMENDED ANSWER TO THE AMENDED COMPLAINT:

Subsequent to the reversal of the judgment by this Court on the previous trial, the defendant, with leave of Court, filed amended answer to the amended complaint on September 4th, 1901.

This answer, amongst other things, denied that the Company made or delivered the policy in the State of New York; it denied that the first premium was paid at any other place other than the State of Washington (Record, pages 13 and 14). It denied that Hill during his life performed all the conditions required to be performed, and denied that any premium whatever was paid upon the policy except the first premium (Rec. p. 14).

The answer then set up six affirmative defenses which are as follows:

1ST AFFIRMATIVE ANSWER AND DEFENSE:

Defendant alleges that the application was made in the State of Washington, and this application provided that there should be no contract of insurance until the policy was issued and delivered and the first premium paid. The policy was delivered and the first premium paid in the State of Washington.

It was provided by the policy that an annual premium of $814.00 should be payable on the 29th day of April in every year, and that any notice of such premium, statutory or otherwise, becoming due is waived, and that policy shall become void by non-payment of premiums, and all premiums paid should be forfeited.

The premium due on the 29th day of April, 1887, was never paid, and Hill and the plaintiffs failed, neglected

and refused to pay the premium. By reason thereof the policy lapsed (Rec., pp. 15, 16, 17).

2ND AFFIRMATIVE ANSWER AND DEFENSE:

Defendant alleges that the premium due the 29th day of April, 1887, was not paid, and defendant entered the policy on its books as lapsed and terminated, and at all times subsequent to April 29th, 1887, treated the policy as lapsed, terminated and void. That Hill never applied to have the policy restored, and at no time did anyone during the lifetime of Hill pay or offer to pay any premium, and by reason thereof Hill wholly abandoned the contract (Rec., p. 21).

3RD AFFIRMATIVE ANSWER AND DEFENSE:

Defendant alleges that it is a Mutual Company, and that the funds out of which its losses are paid arise out of its earnings as such mutual company and the premiums due upon its policies.

That Hill never paid any premium after the 29th day of April, 1887, and that the Company has a large number of other policies outstanding for the purpose of meeting its liabilities. It is necessary for every member of the Company to make payment of their premiums. By reason of the failure to pay the premiums the policy lapsed and the plaintiffs were estopped from claiming the policy to be an existing contract (Rec., pp. 22 to 26).

4TH AFFIRMATIVE ANSWER AND DEFENSE:

The policy in question was waived, abandoned, and rescinded (Rec., p. 26).

5TH AFFIRMATIVE ANSWER AND DEFENSE:

That on or about the 29th day of April, 1887,

the defendant notified and informed Hill that a premium was due, and demanded payment and tendered receipt, but that Hill being fully advised and informed refused to make payment, and then and there intending, and for the purpose of inducing defendant to rely upon his refusal, informed defendant that he was unable to pay the premium and did not intend to make any payment, but, on the contrary, intended to allow the policy to lapse and become terminated and waived for want of payment of said premium, and the defendant, relying upon said conduct of Hill, was induced to and did declare the policy terminated and abandoned, relying upon Hill's conduct (Rec., pp. 27 to 30).

6TH AFFIRMATIVE ANSWER AND DEFENSE:

That the Company, on the 31st day of December of every year, ascertains its liabilities, and by reason of the failure of Hill to pay the premium April 29th, 1887, defendant entered said policy upon its records as lapsed, and did not include the said policy as a liability, and Company and its members have acted on basis that said policy was not a liability. That the larger portion of the single premium paid was absorbed in payment of expenses; that the premium paid purchased one year's insurance, which expired April 29th, 1887, and defendant further alleges: That there never was in fact or in equity any balance or credit by way of surplus, accretion, reserve or otherwise due or owing upon said policy or to the said insured, or any of said plaintiffs; and defendant alleges that to allow recovery on said policy, which has not contributed in any manner to the reserve fund of defendant to meet its liabilities, tends to the disorganization and destruction of defendant's insurance business, and is inequitable to all of defendant's policy holders, and by reason of said premises

plaintiffs should be estopped from any recovery in this action (Rec., p. 30 to 32).

REPLICATION :

The replication of the plaintiffs admits that no premium was paid after the first annual premium, but alleges that no request was ever made of the plaintiffs to pay any such premium nor were the plaintiffs ever notified that any such premiums due were unpaid.

IN REPLY TO THE 2ND AFFIRMATIVE DEFENSE:

Plaintiffs allege that the first premium was paid to the agent of the defendant at the time of the delivery of the application (Rec., p. 36).

IN REPLY TO THE 3RD AFFIRMATIVE DEFENSE:

Plaintiffs admit that they did not pay any premium, but allege that no request was made, and defendants deny that the policy has lapsed or that they are estopped from claiming under the existing contract at the time of Hill's death (Rec., p. 38).

IN REPLY TO THE 4TH AFFIRMATIVE DEFENSE:

Plaintiffs deny all of the allegations in the 4th affirmative defense (Rec., p. 39).

IN REPLY TO THE 5TH AFFIRMATIVE DEFENSE:

Plaintiffs allege that the first premium was paid at the time the application was made, and that no other premium was paid, but allege no request and no notification was given them (Rec., p. 40).

IN REPLY TO THE 6TH AFFIRMATIVE DEFENSE :

Plaintiffs allege that the defendants were at all times ready to pay any premium that might become due on the

policy if they knew of its existence, but that no demand was made upon them or notice given and they knew nothing of the default until after the death of their father.

They further allege that Hill was never notified of the coming due of the premium (Record, p. 43).

III.

Chronological Statement of Facts.

1886, Apr. 28. Written application for insurance signed by George D. Hill, dated at Seattle, Washington, Apr. 28, 1886 (p. 74) witnessed by E. A. Turner, the soliciting agent at Seattle under Heisterman & Co. of Victoria (p. 111).

1886, Apr. 30. Written application of Hill forwarded by Heisterman & Co., Victoria, B. C., to Forbes, General Agent, San Francisco (p. 105).

1886, May 4. Forbes receives Hill's application (p. 126).

1886, May. Forbes forwards Hill's application to New York.

1886, May 13. Secretary Easton sends to Mr. Forbes from New York the Hill policy (p. 124).

1886, May 20. Mr. Forbes receives the Hill policy in San Francisco (p. 125).

1886, May 20. Forbes transmits Hill policy to H. F. Heisterman & Co , Victoria, B. C., saying: "I enclose for collection Policy 281470, Hill, Annual Prem. $814.00. Please collect and remit" (p. 127, 80).

1886, June 12. Hill paid Turner of Seattle his first premium on the delivery of policy which premium Turner transmitted to Heisterman & Co., who forwarded the same to Forbes, from Victoria B. C., (pp. 107, 109, 110).

1887, Feb. Ellen K. Hill, wife of George D. Hill, died (p. 82).

At this time the children were living with their father at Seattle, Washington (p. 84).

Eben Smith, although guardian of the children appointed after the death of Mrs. Hill, had never heard of the policy until after the death of Hill in 1890 (pp. 82, 83).

1887, April 29. *Second premium became due which was never paid.*

1887, May 31. Turner & Lewis of Seattle return to Forbes premium receipt of Hill for second premium due for 1887 uncollected, saying "We regret having to "return you herewith prm. receipts of "Hill, Berb & Budling, as uncol- "lected" We especially regret this in Capt. Hill's case as the policy is a large one, and his intention is to pay the premium, but he is short of money. He expects to have the money in a few days, and if you can hold the receipt for a few days we will notify you by wire as soon as premium is paid and you can forward us receipt" (113).

1887, June 3. Forbes, General Agents, acknowledge re-

ceipt of uncollected premium receipt returned by Turner & Lewis on Hill policy. Every facility was afforded by Mr. Forbes to enable Mr. Hill to pay the premium (p. 128).

1887, June 3. Forbes writes Turner: "If you wire me collection of Capt. Hill's renewal No. 281,470, April 29th, $814, so as to reach me on or before 13th, I will advance the prem. in my May a/c and await your remittance.

"After 13th a ctf. of health will be requisite. I enclose three blanks. Should you need them the enclosed will prove handy."

1887, June 6. Mr. Forbes returns the Hill renewal receipt, to Turner at Seattle saying: "Which I trust you will also be able to collect before the time mentioned in my advices, or, failing in that, that Mr. H., when able, will reinstate the policy, furnishing a certificate of his good health.

"We are anxious that Mr. Hill should not lose the benefit of premium already paid in" (129).

1887, July 8. Turner & Lewis of Seattle wrote the office of Forbes, General Agents returning receipt for the premium on policy No. 281,470, which they could not deliver (p. 115).

The receipt was signed by some general officer of the Company. On payment of the premium the agent is authorized to deliver the receipt. If the receipt

is not delivered it is returned to the General Agent, Mr. Forbes, who returns it to the Company (p. 116).

Mr. Howard H. Lewis, who was the local agent at Seattle, called himself upon Hill, and talked with him about the payment of the premium between May 31, 1887, and July 8, 1887 (pp. 113, 113, 115), and being unable to collect the money due under the receipt, returned the receipt to Mr. Forbes (p. 117). Mr. Forbes had a talk with his son between the 31st of May and the 8th of July in regard to this matter.

1890, Dec. 23. Smith & Kellogg *find policy amongst Hill's papers* and write to the Company (p. 81).

1891, Feb. 3. Company informed Smith, Executor, that the policy was forfeited for non-payment of the Apr. 30, 1887 premium (p. 82).

1895. *Present suit begun after Hanford, J., had decided in Phinney case on the first trial in favor of plaintiff.* George E. Hill never heard of the policy until after his father's death. Ellen Kellogg Hill never heard of the policy until after suit was begun. Eugene Hill never heard of the policy until after his father's death; Eliza Maud Hill, otherwise known as Mrs. Bowman, never heard of the policy until two or three years after her father's death (pp. 86, 87, 88, 89).

IV.

Statement of the Case Required by Rule 21.

The following statement presents succinctly the questions involved and the manner in which they are raised.

The first question is, whether or not the Circuit Court of Appeals erred in holding that under the mandate of this Court, the Trial Court and the Circuit Court of Appeals could only consider the question of the legal effect of the conduct of the persons themselves. This question is raised by the writ of certiorari granted by this Court (see Point I).

The second question is, whether the New York Premium Notice Statute of New York does or does not under the circumstances presented control, and the question is raised by the refusal of the Court to direct the jury to return a verdict in favor of defendant, and by the refusal of the Court to instruct the jury, as requested, and by the charge of the Trial Court to the jury and the assignment of errors based thereon (see Point II).

The third question is, whether or not, even if the Premium Notice statute controls, the plaintiffs are concluded by the failure to pay the premiums. This question is raised by the refusal of the Court to direct the jury to return a verdict in favor of defendant, and by the refusal of the Court to instruct the jury, as requested, and by the charge of the Trial Court to the jury and the assignment of errors based thereon (see Point III).

The fourth question is, whether it was or was not the intention of the New York Legislature to keep the policy alive and its provisions unimpaired notwithstanding successive defaults to pay the premium and the abandonment of the contract. The question is raised by the refusal of the Court to direct the jury to

return a verdict in favor of defendant, and by the refusal of the Court to instruct the jury, as requested, and by the charge of the Trial Court to the jury and the assignment of errors based thereon (see Point IV).

V.

Statement of questions and issues as presented by the petition for the Writ of Certiorari.

First.—Whether the statute of New York, of 1876, as amended in 1877, relating to Insurance Companies transacting the business of collecting premiums in the State of New York, apply to the policy of insurance in this case, which was delivered and first became effective in the Territory of Washington, where at the time of delivery the first premium was paid.

Second.—Whether, if the said policy having been delivered and becoming binding in the Territory, now State, of Washington as a contract was as to premium notices to be controlled by the statute of the State of New York.

Third.—Whether, the first premium having been paid, and the policy having been delivered in the State of Washington, and the insured having at that time and until his death, his residence and post office address in the State of Washington, and having no post office address in the State of New York, the premium notice statute of New York could have any application to the contract of insurance.

Fourth.—Whether the following provision in the application for insurance,

> "And it is agreed there shall be no contract of insurance until the policy shall have been issued and delivered by said Company, and the first premium thereon paid, while the person proposed for insurance is in the same condition of health described in this application; and if said policy be issued, the declarations, agreements and warranties herein contained shall be a part thereof; and the contract of insurance when made shall be held and construed at all times and places to have been made in the City of New York,"

when considered along with other parts of the application and policy, and especially the following printed upon said application, "SPECIAL NOTICE TO APPLICANTS AND POLICY HOLDERS. * * *

> "*Policy holders must not expect to be notified when their premiums will be due.* It is a practice of the Company to send these notices as reminders, when the address is known, but no responsibility is assumed on the part of the Company in consequence of their non-reception",

and the following provision in the policy,

> "Each premium is due and payable at the home office of the Company in the City of New York; but *will be accepted elsewhere when duly made in exchange for the Company's receipt signed by the President or Secretary. Notice* that each and every such payment is due at the date named in the policy, is given and accepted by the delivery and acceptance of this policy, *and any further notice required by any statute is thereby expressly waived*"

subjects your petitioner to compliance with the statute of New York relative to mailing premium notices, notwithstanding the fact that said policy was delivered when the first annual premium was paid in the terri-

tory of Washington, and notwithstanding the fact that the post office address of said insured was at all times during his life in the State of Washington, and that during all such times he had no post office address in the State of New York.

Fifth.—Whether your petitioner, being a Mutual Life Association, whose membership is composed of its premium paying policy holders, can be compelled to pay the death loss, although but a single annual premium had been paid on the policy upon its delivery in the territory of Washington, April 29, 1886, and no payment or offer of payment of the premiums falling due in April, 1887, 1888, 1889 and 1890 was made by or on behalf of the insured in his life time, or offered to be made by or on behalf of any of his beneficiaries.

Sixth.—Whether upon the facts stated in the last proposition, the action is not in the nature of specific performance, and whether plaintiffs bringing this suit are not estopped by reason of failure of performance of the contract upon their part and that of the insured from seeking a recovery from the members of the Association who have by the payment of premiums created a fund out of which plaintiffs in the Trial Court are seeking contribution in the payment of the death loss provided for in this policy.

Seventh.—Whether, by reason of the admission that before a second annual premium had been paid upon the policy, and the undisputed testimony that at the time the second annual premium fell due, the local agent of the Company, having repeatedly presented the renewal receipt to the insured, George Dana Hill, Seattle, Washington, and requested payment, and the said Hill having been informed of the amount of the premium and having

been offered in exchange for its payment such renewal receipt, but failing and declining to make payment of the same, the policy was not abandoned and terminated; and further, whether the Company was not thereby warranted to treat the policy as terminated, and so enter it as it did upon its books, and whether if the policy was thus terminated and abandoned, the beneficiaries are not bound.

Eighth.—Whether the refusal of the insured, George Dana Hill, to make payment of the second annual premium, as is shown by the undisputed testimony, and continuing in such refusal until his death in December, 1890, is not the refusal of the beneficiaries.

Ninth.—Whether the Insurance Company was required to make demand of payment from the beneficiaries, who from the date of the insurance until the death of George Dana Hill, were his infant children of tender age, left in his home at Seattle, under his parental care and keeping.

Tenth.—Whether, for the purposes connected with the payment of premiums, the insured, George Dana Hill, was not the agent of the beneficiaries in all matters relating to the payment of premiums, and notice thereof, and whether they were not bound by his acts and conduct in relation thereto.

Eleventh.—Whether the premium notice laws of the State of New York enter into this contract of insurance so as to control the business of collecting premiums on the policy in the face of the specific stipulation of the parties in the policy that no notice other than the policy itself provides, shall be given, any statute to the contrary notwithstanding.

VI.

Specification of Errors.

The following are the errors assigned by the plaintiff-in error, and upon which it relies for the reversal of the cause:

1. Upon the conclusion of the testimony, and prior to the argument of counsel to the jury, and prior to the charge of the court to the jury, the defendant requested the court to instruct the jury upon the whole case, and upon all the evidence, to render a verdict in its favor, which request was refused (Rec., p. 173).

2. Error in refusing to grant defendant's motion to instruct the jury to return a verdict in its favor (Rec., pp. 174, 175).

(*a.*) Because issue was joined as to whether the contract of insurance was a New York or a Washington contract, and the evidence showed the first annual premium was paid in exchange for the delivery of the policy of insurance at Seattle, Washington, and the contract came into being in the State of Washington.

(*b.*) Issue was made whether the conditions of the policy were performed on the part of the insured, entitling a recovery, and there was no proof tending to show that any premium whatever save the first annual premium had ever been paid or offered to be paid.

(*c.*) Because it is admitted in the pleadings and stipulated by the parties that the residence of the insured, George Dana Hill, from the time of the application for the policy in April, 1886, down to his death, December 4, 1890, was at Seattle, Washington, and that during all of that time the residence and postoffice address of the insured was at Seattle, Washington, and that he had

no residence or postoffice address in the State of New York.

(*d.*) Because it was shown that the policy was actually delivered and the first premium was paid at Seattle, Washington, and there the policy became a contract, and because the policy expressly provides that no notice whatsoever should be given of the due date of any premium, and because the application placed by the applicant with the company contains a notice and warning that no notice is to be given of when the premiums should become due upon the policy, if entered into. The application was accompanied with a form of policy as it was to be issued, expressly providing that no notice whatever of the due date of premiums should be given, any statute to the contrary notwithstanding.

(*e.*) Because it was shown and not contradicted that at the time the second annual premium of April 29, 1887, became due, the agent of the insurance company in Washington being in possession of the renewal receipt applied to the insured to make payment of the premium then due, in exchange for the receipt at the City of Seattle, and the insured failed to do so because not in funds, and for other reasons, and the company again placed the renewal receipt in the hands of its Seattle agent, who again called upon the insured to make payment of the premium, when he failed and declined to do so, and the renewal receipt was returned to the company because of such failure and declination to make payment.

(*f.*) Because it is admitted in the pleadings that none of the plaintiffs ever paid any premium, or caused any premium to be paid after the one of April 29, 1886, claiming they were not called upon to do so except upon notice served upon *them* under the statute of New York

(*g.*) Because in the whole transaction of insurance, so far as dealing with premiums is concerned, and meet-

ing the conditions of the policy, the insured George D. Hill acted for all the beneficiaries, and notice to him and knowledge on his part, and failure and omission on his part was notice, knowledge and failure on the part of the plaintiffs in the case, and they cannot have the benefit of the policy of insurance upon the life of George Dana Hill without ratifying his conduct, and being controlled and governed by his conduct in the premises, and whatever would bind or estop him from terminating the contract, so far as he was concerned, had the same effect upon them.

(*h.*) Because in this case it is proven that the defendant insurance company is a mutual life association, whose membership consists of its persistent policy-holders, and the burden of paying losses falls upon the persistent policy-holders or contract-performing members of the company, and that in this case there were four consecutive years allowed to pass without the payment of any premium or part of a premium, and for that reason plaintiffs cannot recover from the defendant company, or the other members of the association, upon a policy which had remained in default for a period of four years.

(*i.*) *Because if the statute of New York regarding premium notice in any manner affected the policy of insurance in this case and the question of the due date of premiums, it could do so only by the convention of the parties, and not by operation of law, and the parties have agreed that the statute shall not apply to the policy.*

(*j.*) Because the case as made by the plaintiffs rests upon plaintiffs' compliance with the terms and conditions of the policy of insurance, and not upon any failure of the defendant to comply with the statute of

New York relative to the giving of notice of the due date of premium, the allegation of performance of conditions having been entirely disproved.

(*k.*) Because there is a variance between the case pleaded and the case relied upon by the plaintiffs in departing from a contract of insurance.

(*l.*) Because the notice under the statute of New York and the statute itself has reference to the forfeiture of premiums already paid on the policy. and the advantages accruing therefrom, or the reserves thereon, and to nothing else, and that such were the only things capable of forfeiture (Rec., pp. 174, 175).

3. Refusal of the court to give defendant's requested instruction No. 1 as follows:

"I.

"The court instructs the jury as a matter of fact the contract of insurance sued on did not become an existing contract until it was delivered to the insured George D. Hill at Seattle, Washington, when and where the first annual premium was paid, but it was, at the time when this contract came into being, agreed by and between the parties that it should be construed to be made in New York City, but it was at the same time agreed between the contracting parties that no statute, whether of New York or elsewhere, should require any notice to be given of when any premium on the policy fell due, but that the policy itself afforded the notice and all the notice of the date at which the premiums fell due, to wit, on the 29th day of April, 1887, and the same day of each succeeding year during the continuance of the policy, and if not so paid the policy should terminate and become void. It is denied by the answer that any part of the premium falling due April 29th, 1887, was ever paid. If this premium was not paid, then the policy became forfeited and ended, and the plaintiffs have no right to recover.

The Court instructs you there is no evidence before you that this premium falling due April 29th, 1887, or any part of it, or any subsequent premium, was ever paid, but on the contrary, the evidence is that such premium was not paid" (Record, p. 176; see also p. 156).

4. Refusal of the Court to give defendant's requested instruction No. II as follows:

"II.

"The plaintiffs in this case admit that aside from the first premium paid in 1886 upon the delivery of the policy none of them have ever paid any premium upon this policy. The answer denies that any premium save the first upon the delivery of the policy was ever paid by anyone. The Court instructs you there is no evidence in the case tending to show that any premium, save the first annual premium paid upon the delivery of the policy, ever has been paid, while, on the contrary, there is evidence tending to show that no such premium has ever been paid, and upon this state of facts you should render a verdict in favor of the defendant" (Record, p. 177; see also p. 158).

5. Refusal of the Court to give defendant's requested instruction No. III as follows:

"III.

"The Court instructs you there is no evidence in this case tending to show that the insured George D. Hill, at any time from the time of making his application for the policy sued on in April, 1886, to his death, December 4, 1890, had any post office address in the State of New York, but on the contrary, it is stipulated and agreed by the parties that during all of that time his post office address was at the City of Seattle, in the State of Washington. The Court instructs you as a matter of law that the defendant was not required by any statute of the

State of New York or elsewhere to serve a notice of the date when the premium became due upon the insured George D. Hill, except he had a post office address in the State of New York, and as the Court has advised you, there is no evidence that he had a post office address in the State of New York, or anywhere, save in the City of Seattle, State of Washington" (Record, p. 177).

6. Refusal of the Court to give defendant's requested instruction No. IV as follows:

"IV.

"The Court instructs you that if the insured George D. Hill failed to pay the premiums on the policy sued upon, falling due on the 29th day of April, 1887, the 29th day of April, 1888, the 29th day of April, 1889, and the 29th day of April, 1890, then he abandoned the contract and the same became terminated, and there would be no right on the part of these plaintiffs to recover, and your verdict in such case should be in favor of the defendant. The Court instructs you that there is no evidence tending to show that said George D Hill, or anyone, paid any of the premiums for any or all of these four years, but there is evidence tending to show that he did not, and that such premiums were not paid" (Record, p. 178; see also p. 159).

7. Refusal of the Court to give defendant's requested instruction No. V and Va. as follows:

"V.

"The Court instructs you that the plaintiffs in this case rely for their recovery upon the performance of the conditions on their part, or that of the insured, as the ground of their right to recover, and that one of the conditions upon which such right of recovery rests is that the premiums falling due on the 29th day of April, 1887, and on that day of each succeeding year dur-

ing the life of said Hill, which ended December 4, 1890, were paid. The Court further instructs you that there is no evidence tending to show that anof said premiums were ever paid, or caused to paid, and under the case as made by plaintiffs, recovery cannot be had for failure on the part of the insurance company to comply with any statute of the State of New York relative to giving notice as to when the premium or premiums fell due To allow the plaintiffs to recover because of failure to give notice under the statute of New York would be what in law is termed a departure in pleading which cannot be permitted.

V. A. The Court instructs you that in matters relating to the payment of premiums upon this policy the insured George D. Hill was the agent or trustee of the plaintiffs, with full power to bind them in that respect, and any failure, omission or act on his part to make payment of premium or premiums as the same became due, became their failure, omission or act" (Record, p. 178, see also p. 161.)

8. Refusal of the Court to give defendant's requested instruction No. VI as follows:

"VI.

"The Court instructs you that the defendant in this case is a mutual life insurance company or association, whose membership consists of what in law is known as its 'persistent policy holders', that is, the policy holders of the company keeping up their policies by the payment of premiums as falling due, and if you find that the premiums on the policy in suit falling due April 29, 1887, 1888, 1889 and 1890 were not paid and have not been paid, and the Court further instructs you that there is no evidence that any of the same have been paid, then the Court instructs you your verdict should be in favor of the defendant" (Record, p. 179, see also p. 162).

9. Refusal of the Court to give defendant's requested instruction No VII as follows:

"VII.

"The Court instructs you there is no statute of New York, nor any law, requiring or directing the defendant insurance company to give any notice to any of the plaintiffs in this case as to when premium upon the policy sued upon became due. Plaintiffs had the right, however, by virtue of their interest in the policy, to have paid any premium at the time it fell due, and the defendant would have been bound to accept it. It would have been the duty of the plaintiffs, or any of them, to have made tender of the amount of the premium at the time it fell due, to the company or some of its authorized agents. There is no proof, however, that any such tender was made, but upon the contrary, the pleadings admit that none of the plaintiffs ever did pay or cause to be paid any such premiums" (Rec. 180).

10. Refusal of the Court to give defendant's requested instruction No. VIII as follows:

"VIII.

"Upon all the evidence in the case, gentlemen of the jury, the Court instructs you to find a verdict in favor of the defendant" (Rec., 181).

11. Error of the Court in giving the following instruction:

"Now, a refusal implies an affirmative act with knowledge and with an opportunity to act. It is not synonymous with omission; a mere omission to pay the premiums has no such effect, but the defense that is interposed here is that these plaintiffs with knowledge, that the premiums were due and were unpaid, refused to pay them, and that is the question which I

submit for you to decide, whether the evidence proves that there was any such affirmative act on the part of the plaintiff in this case as would amount to a refusal to pay the premiums, or whether there was any expressed contract or agreement since the delivery of the policy, which amounts to an agreement on their part to surrender the policy or abrogate the contract" (Rec., 181).

12. Error of the Court in giving the following instruction :

"There is another question which I submit to the jury, and that is, whether Captain Hill himself, whose life was insured, abrogated this contract by any agreement on his part to surrender or avoid it. He was not the agent or the trustee of the plaintiffs, and his act would not be an equivalent to their act, but the contract was made by him, and his failure to pay the premium, if it was known to the plaintiffs and was acquiesced in by them and ratified by them, would be an abrogation of the contract. His act, not especially authorized or ratified, would not have that effect" (Rec., 182).

13. Error in giving the following instruction :

"If you find from the evidence that there was any affirmative act on the part of these plaintiffs or any act of their father, that was approved and ratified by them, which abrogated this contract in any way, your verdict would be for the defendant. If there was no such subsequent abrogation of the contract, your verdict would be for the plaintiff and you will return a verdict in favor of the plaintiffs in the sum of twenty-nine thousand and twenty dollars" (Rec., 182).

14. Error in refusing to sustain defendant's motion for a new trial on the ground that the verdict was contrary to the law and the evidence (Rec., 182).

15. Error on the part of the Court in refusing to sus-

tain defendant's motion for judgment in its favor, notwithstanding the verdict returned in the cause (Rec., 183).

BRIEF OF THE ARGUMENT.

POINT I.

The rulings by the Trial Court which were affirmed by the Circuit Court of Appeals were based upon the theory that the Trial Court under the mandate of this Court could only consider the question of the legal effect of the conduct of the plaintiffs themselves, and that this Court had decided that in the Hill case the New York Statute governed. This was clearly erroneous.

This company aims as far as possible, except in cases of fraud, to do business on the principle laid down by Judge Caldwell of the United States Circuit Court, namely, that if the Company has the insured's money and the insured has the Company's policy, the Company should pay. In this case and in others of the same "cluster", as Judge Hanford puts it, the insured has the Company's policy, but the Company has not the insured's money. The doctrine of the Supreme Court of the United States is that the local New York premium notice statutes do not operate extraterritorially, on the vast business done by New York Companies outside that State, and throughout the world, and that

technical construction of statutes cannot be substituted for the payment of premiums.

If the principles and doctrines which the Supreme Court decisions have established are enforced in their full spirit and intent, there will be no difficulty in disposing of this case or any other similar cases. They were not so enforced in this case in the Court below, so that the time of this Court must be taken in demonstrating that the propositions hereinafter contended for are in full accord with the doctrines of this Court.

The litigation in the Phinney, Allen, Sears & Cohen cases has all terminated.

There are substantially only two main points in this case, and in both of these the Court below erred. The first is that the New York statute did not operate extraterritorially on the business of collecting premiums in Washington, for so the Supreme Court decided in the Cohen case.

The second is that Judge Hanford decided wrongly that the children's interests were not affected by the default of Hill in not paying the premium.

In no part of the record is there any reasoning by the courts below, or any legal authority cited by them, in support of this last proposition.

The moment that it is pointed out that the *statute has no concern with notice to beneficiaries themselves. all basis for the contention that they are not affected by default of Hill completely fails.*

In the Hathaway case (Hathaway *v.* Mutual Life, 106 Federal Reporter, 815, and 45 C. C. A., 42), the Circuit Court appeals followed the Cohen Case in the 179 U. S. See also Johnson *v.* Mutual Life, 180 Mass., 407 ; Atty. Genl. *v.* Netherlands Fire, 181 Mass., 522.

The facts in the Hill case are precisely the same as in the Hathaway case, except as to an irrelevant clause in the Hill policy, hereinafter discussed, about where

the policy is to be construed as made. In the Hathaway case the Court, through District Judge HAWLEY, stated as follows:

"From the foregoing statement, it will readily be seen that the facts, as well as the legal principles involved herein, are substantially the same as were presented to the Supreme Court in Insurance Co. *v.* Cohen, 179 U. S., 262 * * * The Court, after a review of several authorities, came to the conclusion 'that the statute of the State of New York does not, under the circumstances presented, control, and that the rights of the parties are measured alone by the terms of the contract. The insured having failed to pay the premium for years before his death, the policy was forfeited.' Upon the authority of that case the judgment of the Circuit Court is reversed and cause remanded for a new trial."

The Court below in this case laid too much stress on the obiter remark of the Supreme Court of the United States about no reference in the pleadings to Mrs. Cohen. This Court in this case had already stated that it was an interesting question what was the effect of Hill's failure, but in the Cohen case as they held the statute inapplicable, there was no occasion to enquire into the effect of Cohen's failure. But in this case, also, there is no real occasion to enquire into the effect of Hill's failure, for the statute does not govern any more than it did in the Cohen case.

This case does not disclose anything more than a purely speculative claim. It was started five years after Hill died, on the basis of the old Phinney case before that case was decided by this Court. Hill paid one premium in 1886, then abandoned the policy in 1887, and lived some three years afterwards, during which time neither he nor the children nor anyone in their behalf paid any

attention to the policy. The plaintiff, Ellen Kellogg Hill discloses the real speculative situation in the following questions and answers (Record, page 86).

Q. Miss Hill, when did you first become aware of the existence of the policy sued upon here? A. Well, I am not sure what time, but it was not until it was put in the hands—until it was made a suit.

Q. You were not aware until after the suit? A. Not until after the suit was begun.

Both the above points are taken up in detail hereinafter.

THE OPINIONS OF THE COURT BELOW AND OF THE TRIAL JUDGE ON MOTION FOR JUDGMENT IN FAVOR OF THE DEFENDANT *non-obstante veredicto*, SHOW A MISCONCEPTION OF THE RULINGS OF THIS COURT.

THERE IS NO "LAW OF THE CASE" WHICH PREVENTS THE COURT FROM EXAMINING THE WHOLE RECORD, AND CONSIDERING WHETHER THE NEW YORK STATUTE GOVERNS.

Judge Hanford's opinion (p. 53), is a complete misapprehension of the effect of the decisions in this Court, and practically ignores the law as laid down in the Cohen case, 179 U. S., 263, *which was decided by this court after it had decided the Hill case.*

The learned Judge claims that the only issue under the mandate of the Supreme Court re-opened for adjudication was the issue as to the conduct of the plaintiffs themselves and its legal effect.

The Circuit Court of Appeals, it is true, refers to the abandonment point, and then says (page 202 of Record) that the case was sent back to the Circuit Court for trial on this question alone, and further says that the decision of this Court—that is, the decision of the Court

of Appeals upon the other points not having been criticised or reversed by the Supreme Court—was then the law of the case for the Court of Appeals. The Circuit Court of Appeals, on the first hearing before it, held that the Hill contract was governed by the statute of the State of New York, 97 Fed. 267.

It can be readily demonstrated, as we do below, that the Supreme Court of the United States assumed the contract to be governed by the law of New York, without discussing or deciding the question. The Supreme Court of the United States is not required by the Constitution or laws, and that is true of the Appellate Courts in some of the States, to pass upon all questions that are presented. As a matter of practice, they ordinarily do not pass upon any more questions than are absolutely necessary for the determination of a particular case; and, where the decision of one question upon a re-trial may dispose of the entire case, it is the common practice of the Supreme Court to do as it did in this and the Phinney case. The demurrer had admitted the affirmative defense in which the company pleaded that both the insured and the beneficiaries, including the plaintiffs, had failed, neglected and refused to pay the second premium. If these facts were true, it constituted in the opinion of this Court a complete defense to the action on the policy. A demurrer to this defense was thus sustained in the Circuit Court of Appeals, but this Court overruled the demurrer and the only question *actually* decided by the Supreme Court was that a good defense was pleaded. It was fair, therefore, for this Court to assume that the case would be disposed of upon this issue of fact, and hence that it was unnecessary for them to determine the principal or primary questions of law presented in the case.

As a matter of fact, however, the Circuit Court of

Appeals, on the hearing below on the last appeal, did consider fully the question whether under the Cohen case the contract was governed by the law of New York, and erroneously held that it was. It remains for us to show in detail that the question whether the Hill contract was governed by the New York law or not is one open to discussion and decision at this time by this Court.

Their error is shown by an examination of The Mutual Life *vs.* Hill, 178 U. S., 347. Mr. Justice BREWER says: "This case resembles the last two decided," that is, the Sears case and the Phinney case. Then Justice BREWER says: "Here, as in the last two cases (that is, in the Sears and Phinney cases), is disclosed a distinct agreement on the part of the insured and the Company to waive and abandon the policy and all rights and obligations on the part of the parties thereto." The Hill case, therefore, is on the same footing as the Phinney and Sears cases. The final disposition of the Hill case by the Supreme Court was as follows:

> "Under those circumstances we think the case
> "falls within the same rule as the preceding; and
> "the judgments of the Court of Appeals of the
> "Ninth Circuit and of the Circuit Court of the
> "United States for the District of Washington
> "are reversed, and the case remanded to the latter
> "Court, with instructions to overrule the demurrer
> "to defendant's answer."

That is, after the mandate came down, the case stood in the same position as if Judge Hanford had on the 18th day of January, 1899, overruled the plaintiff's demurrer to the answer instead of sustaining it. Every single issue of fact and law which would have been in this case had Judge Hanford originally overruled the

defendant's demurrer was presented when this case came on for trial the last time, subject only to the controlling effect in this Court of the decisions in the Supreme Court of the United States in 178 and 179 U. S., and except that there was an amended answer. There is absolutely no warrant for maintaining that the only issue which under the mandate of the Supreme Court was re-opened for adjudication in the Circuit Court was the issue as to the conduct of the plaintiffs.

Following the lead of Mr. Justice BREWER and turning back to the Sears case, 178 U. S., 345, the statement of Mr. Justice BREWER there is, "In view of what has already been decided in Mutual Life Insurance Company *vs.* Phinney, executrix, *ante*, 327, it is needless to do more than note the fact that, as shown by the answer, after the insured had once defaulted, etc.." and Mr. Justice BREWER further said, "As we held in the prior case (that is the Phinney case) there is nothing in the New York Statute (*if controlling at all*) to prevent the parties from dealing with that as any other contract, and if they chose to abandon it, their action is conclusive," and the disposition by the Court was as follows:

> "The judgments of the Court of Appeals of the "Ninth Circuit and of the Circuit Court of the "United States for Washington are reversed and "the case remanded to the latter Court, with in-"structions to overrule the demurrer to defend-"ant's answer."

Following again the lead of Mr. Justice BREWER and turning back to Mutual Life *vs.* Phinney, 178 U. S., 327, at pages 337 and 338, this Court states fully our contention that the Statute of New York does not operate extra-territorially and then says: "We are

not insensible of the importance as well as the difficulty of the question thus presented in these various aspects, *but think that the case may properly be disposed of without any consideration or determination thereof. We shall assume, without deciding, that the law of New York does control in respect to this contract*, and still are of the opinion that the judgment must be reversed for error occurring on the trial. On page 344, Mr. Justice BREWER says:

> "But it is a very different question whether the "Executrix of the insured, after his long delin- "quency in the payment of premiums, can enforce "the contract as against the other insured parties, "thereby diminishing their interest in the accumu- "lated reserve. Ordinarily no one can enforce a "contract unless on his part he performs the stipu- "lated promise, and it may be that this rule is "operative in this case. We do not care to decide "the question, and only mention it for fear that it "should be assumed we had overlooked it. It is a "question which may never arise in the future liti- "gation of this case, and until it necessarily arises "we do not feel called upon to decide it."

The final disposition of the Phinney case is thus stated by Mr. Justice BREWER:

> "For these reasons the judgments of the Court of "Appeals of the Ninth Circuit and of the Circuit "Court of the United States for the District of "Washington are reversed, and the case remanded "to the latter court with instructions to award a "new trial."

Consequently, in the Hill case this Court assumed, "without deciding," that the law of New York controlled.

It is apparent, therefore, that the Hill case was before the Court below for trial on all the issues involved, the Court being controlled by the doctrine stated in the Phinney, Sears and Hill cases to which we refer and also by the doctrine in the Cohen case to which we will refer.

The Hill and Sears cases were argued in March, 1900, and decided in May, 1900. At the same time there was argued the Cohen case, reported in 179 U. S., 262. Although this case was argued at the same time, viz., March, 1900, it was not decided until September, 1900.

In this Cohen case Mr. Justice BREWER states as follows:

> "Mutual Life Insurance Company *v.* Phinney, 178 "U. S., 327, was an action against the same insur- "ance company, in the same district, on a policy "like the one in controversy here, save that in that "the insured was himself the beneficiary, * * * "In the opinion we referred to the fact that there "was a primary question of the applicability of a "statute of the State of New York, but deemed it "unnecessary to decide it. That decision was fol- "lowed by the cases of the same company against "Sears, 173 U. S., 345; against Hill, 178 U. S., 347; "against Allen, 178 U. S., 351. *All of which cases "were disposed of in like manner.*"

And then the Court went on to say that the primary question noticed but not decided in those cases was presented in the Cohen case.

The Court then went on to hold, "In accordance with the claim of defendant, made in this case, the statute of the State of New York did not operate extra-territorially."

The Court ends its opinion by saying: "We conclude, therefore, that the statute of the State of New York does not under the circumstances presented con-

trol, and that the rights of the parties are measured alone by the terms of the contract. The insured having failed to pay the premium for years before his death, the policy was forfeited," and the final disposition of the case to be as follows:

> "The judgment of the Circuit Court of Appeals
> "will be reversed and the case remanded to the
> "Circuit Court of the United States for the Dis-
> "trict of Washington, with instructions to set
> "aside the judgment and overrule the demurrer."

Upon the second trial herein Judge Hanford held that the only issue for determination was the one presented by the defense of waiver and abandonment which was submitted to a jury and the verdict was against the Company. On denying motion for judgment *non obstante veredicto*, HANFORD, J., said: "After a great "deal of deliberation I feel constrained to hold that as "the main questions above outlined were fully con- "sidered by this Court and by the Circuit Court of "Appeals and decided in favor of the plantiffs, and as "the decisions of these questions are left undisturbed by "the Supreme Court, they must now be regarded as the "law of this case."

We have shown that the scope of the decisions by this Court was not as claimed by the plaintiff. Besides, this Court is not limited.

As Mr. Justice BROWN said in the case of the Panama Railroad against The Napier Shipping Company, 166 U. S., 284: "That while the Court of Appeals may have "been limited on the second appeal to questions arising "upon the amount of damages no such limitation ap- "plies to this court, when, in the exercise of its super- "visory jurisdiction, it issues a writ of certiorari to "bring up the whole record. Upon such writ the entire "case is before us for examination."

We are not, of course, claiming that it is not the settled law of this Court that whatever has been decided on one appeal or writ of error cannot be re-examined on a second appeal or writ of error brought in the same suit, and that the first decision has not become, as far as it goes, the settled law of the case (as per rule stated by Mr. Justice Brewer in Thompson *vs.* Maxwell, 168 U. S., 456).

There is also a different rule touching the law of the case when applied to a judgment upon demurrer as distinguished from one upon pleadings and proof (see Mr. Justice Brown's opinion in Wiggins Ferry Company *vs.* R. R., 142 U. S., 410). This rule of the law of the case may also only be invoked as to questions which have necessarily been actually decided, but does not apply to suggestions on the part of the Appellate Court which may be applicable upon a new trial.

See Patillo *vs.* Commission Co., 108 Federal, 729, where the Court says: "While the rule that an adjudica-
" tion by an Appellate becomes the law of the particular
" case on all subsequent trials is a wholesome rule, and
" one that should be enforced, yet the rule should be
" confined to questions that where actually considered
" and decided and it should not be extended so as to
" embrace dicta or intimations contained in an opinion
" which may be thought to foreshadow the views of the
" Appellate Court on other questions."

Applying this rule, the decision of this Court in this case as governing further proceedings, is only the law to the extent that the demurrer was improperly sustained. In passing upon the sufficiency of the pleadings the practice is almost universal with the Appellate Tribunals to limit their decisions to the determination of the issues of law so presented. No inference such as was indulged in by Judge Hanford, is justified.

It is perfectly apparent, therefore, from what we

have said above, that the Courts below were clearly in error in not applying to the trial and decision of the issues of fact and law in this case, the doctrine laid down in The Mutual Life *vs.* Cohen, 179 U. S., 262, and in claiming that under the mandate of the Supreme Court of the United States they could only consider the question of the legal effect of the conduct of the plaintiffs themselves, although as a matter of fact, the Circuit Court of Appeals did consider the Cohen case.

POINT II.

The premium notice statute of New York does not under the circumstances presented control, and the rights of the parties are measured alone by the terms of the contract. The premium, falling due in 1887 not having been paid, the insurance, $20,000, is not collectible (Cohen case, 179 U. S., 270).

We have shown in Point I that this Court assumed "without deciding" that the statute controlled in the hearing of the Phinney, Hill Allen & Sears cases, on demurrers, but in the subsequent Cohen case held it had no extra territorial operation.

The Hill policy was a Washington contract under the decision in the Cohen case, just as the Cohen contract was a Montana contract, and as the New York statute has no extra territorial application, it did not govern the collection of premiums in Washington, Hill like

Cohen having no residence or post office address in the State of New York.

This Court in the Cohen case has decided that the statute was intended to have no operation beyond the State of New York. In addition to the reasons given of the local and mere regulating nature of the statute, this Court calls attention to a number of its features as indicating both that it was not intended to so operate, but in the nature of things could not have an extra territorial effect. The Court says:

> "Again, the terms of the act itself tend in the same direction. It provides for a 30 day notice. While such a notice might be reasonable as to all policies within the State, yet when it is remembered that some, at least, of the New York insurance companies are doing business in all quarters of the globe, it is obvious that a 30-day notice in many cases would be of little value."
>
> "Further, by Section 2 the statute provides that an affidavit by one authorized to mail the notice shall be 'presumptive evidence' of the giving of the notice. Can it be supposed that the Legislature of New York was contemplating a rule of evidence to be enforced in every State and nation in the world?"
>
> "These considerations lead to the conclusion that the statute of New York, directed as it is to companies doing business within the State, was intended to be and is, in fact, applicable only to business transacted within that state." (p. 266-7.)

In this case the fact is unquestioned that George Dana Hill, the insured, from the date of his application in April, 1886, to that of his death, December 4, 1890, resided in and was a citizen of Seattle, Washington. Such was his residence and post-office address at the time of the application and the issue of the policy. His application stated that no

change of residence or post-office address was contemplated by him. It is agreed that throughout this entire time his residence and post-office address was at Seattle, Washington, and that he had no residence or post office address in the State of New York. There is no dispute of the fact that the policy was delivered and the first annual premium paid at Seattle, Washington.

In Mr. Warburton's brief on the application for the writ in this case he says: "The application in the Hill "policy contained the agreement that it was made sub- "ject to the charter of the company and to the laws of "New York. *This is the identical provision in the "Cohen case, and if this were all there was in the Hill "contract tending to show it was the intention of the "parties to make it a New York contract, we would ad- "mit that the Cohen case was against us on this point. "But this is not all.*"

The only point then made by the plaintiff to differentiate the Hill case from the Cohen case, so far as the operation of the New York statute is concerned, is that the Hill application contained the clause as follows:

"And it is agreed that there shall be no contract of insurance until a policy shall have been issued and delivered by the said company, and the first premium thereon paid while the person proposed for insurance is in the same condition of health prescribed in this application; and if said policy be issued, the declarations, agreements and warranties herein contained shall be a part thereof; and the contract of insurance when made shall be held and construed at all times and places to have been made in the City of New York."

This special clause was not intended to and did not put the New York premium notice Statute in operation in Washington, so as to govern the collection of the Hill premiums there and this clearly appears from the following considerations:

(1.) *There is no express reference in the policy to, or incorporation therein of any premium notice statute as governing the parties except to waive it.*

(2.) *Such an intent to make the New York premium notice statute govern would be inconsistent with the clause in the policy expressly waiving any statutory notice.*

(3) *The claim of the plaintiffs involves the finding of an express intent to make the New York statute which has no extra territorial operation, operate extra territorially, by agreement, the effect of which would be to change the statute by agreement. This intent is baseless and unreasonable. The statute is drawn with reference to New York business alone.*

(4) *The Baxter application and policy were not similar to the Hill application and policy* since the special clause in the Baxter policy had the words therein "*and to be executed*" and the application and policy were otherwise different, also.

(5) *The special clause covers primarily any laws of New York as to declarations, agreements and warranties in the application, and the legal situation is the same in this respect as in the Cohen case.*

(6) *Even if the policy had been actually made in the City of New York the notice statute would not have operated upon the business of collecting its premiums in the State of Washington, even if also it had not been waived.*

(1) *There is no express reference in the policy to or any incorporation therein of any premium notice statute as governing the parties except to waive it.*

The language in the application is, "Application to " the Mutual Life Insurance Company of New York for

"a five-year distribution policy subject to the charter "of said Company and the laws of said State."

The application also contains the clause above referred to, namely, "and that if said policy be issued, "the declarations and agreements and warranties herein "contained shall be a part thereof and the contract of "insurance when made shall be held and construed at "all times and places to have been made in the City of "New York."

This language does not *expressly* refer to any particular statute in the State of New York. The fastening of any particular law to the contract as governing the actions of the parties thereunder, is entirely inferential.

In the policy the amount is payable to the wife, "if living in conformity with *the statute*." The statute there referred to is the statute of NewYork relating to a Married Woman's policy such as this.

According to the decision in the Supreme Court in the Cohen case it was held that the Legislature never intended that the statute should operate extra-territorially. The parties themselves have not by any agreement or convention in the application or policy *expressly agreed* that the New York notice statute should govern. It is, indeed, true that this Court in the Cohen case said :

"It is not doubted that a contract by an insurance "company of New York, executed elsewhere, might by "its terms incorporate the laws of New York and make "its provisions controlling upon both the insured and "the insurer."

This is true, but this contract did not by its terms incorporate this premium notice law of New York and did not by its terms make its provisions controlling upon both the insured and the insurer. On the contrary it waived them.

The language expresses the intent of the parties that the contract when made should be held and construed to have been made in New York City, but it expresses no intent as to what particular statutes, if any, of New York State shall control the actions of the parties therein. The language is satisfied and fed by the suggestion that it was intended to incorporate into the policy the Married Woman's Acts. The contention of the plaintiffs, therefore, is inferential merely and their inference is clearly untenable. Had it been the intent of the parties that the New York premium notice statute should be controlling, it would have been an easy matter to have so provided in the contract. They could have stipulated expressly in regard to notice that the contract was to be governed by the statute of the State of New York, on the contrary they stipulated expressly that no such statutory notice should be given or required, and the effect of this waiver will be considered hereafter.

(2.) *Such an intent to make the premium notice statute govern would be inconsistent with the clause in the policy expressly waiving any statutory notice.*

In addition to the clauses contained in the *application* for the policy referred to in (1) above, the *policy and application* contain the following clauses which are of vital importance in this case:

"Notice that each and every such payment is due at "the date named in the policy, is given and accepted "by the delivery and acceptance of this policy, and "any other notice *required by any statute*, is hereby "expressly waived" (Record, page 78).

This clause is binding of course on Hill's children.

In the application also as a special notice to applicants and policyholders there was the following clause:

"Policyholders must not expect to be notified when "their premiums will be due. It is the practice of the "company to send this notice as a reminder when the "address is known, but no responsibility is assumed on "the part of the Company on account of their non-re-"ception" (Record, page 75).

These clauses are absolutely inconsistent with the claim that it was the *intent* of the parties that the New York statute should control their actions in respect to notices.

That is, assuming that the general language of the the special clause in question related to anything except matters connected with the application and married woman's act, there being in the clause no express reference to any particular statute of New York, it is entirely consistent with such clause that other parts of application or policy *could except any particular statute of New York* from the operation of the clause. It is clear, therefore, that the clause was not intended to cover the premium notice statute because of the above provisions in regard to notice and waiver.

As the claim made can be only that the statute operates by agreement or convention of Hill and the company, no question can come up, of course, as to the ability of Hill to waive by convention the operation of such statute. For it is the *convention* of Hill and the company, expressed in the special clause, on which Mr. Warburton wholly relies. It was not neces-sary for the Supreme Court of the United States to go into this question, because the Statute was held not applicable, and the special clause peculiar to the Hill case was not in the prior cases, making this argument therefore irrelevant therein, yet we think that the validity of the waiver, even in a case where the statute would be otherwise applicable, was necessarily involved in the statement of the Supreme Court in the Sears case,

"that there was nothing in the New York statute (if controlling at all) to prevent the parties from dealing with that as with any other contract."

It is perfectly clear that the contract between the parties was that the company should be under no obligation to send any notice, either statutory or otherwise. This contention, therefore, stated in (2), is absolutely destructive of the plaintiff's position.

The inference of the plaintiff is overcome by the above expressly specified mutual agreement. The parties by convention have not only not failed to incorporate the premium notice statute in the policy but have incorporated into it a stipulation directly the opposite to the statute so far as notice of due dates of premiums is concerned. The plaintiffs' deduction—a contention based solely on inference—can only arise where there has been a failure of expression.

If the parties by their contract had intended to incorporate the premium notice law of New York into it as a part thereof, and had expressly done so, then this law might govern. No question of public policy arises for consideration. The parties were engaged in the transaction of business in the State of Washington, where the contract was made, and were entirely at liberty to make that contract if they saw fit. Their contract was made by the separate constating instruments, the application and the policy. The policy was the last of these instruments. It was based upon the first, and by reference made the first a part of it. The policy contained the express provision above referred to, waiving any notice required by statute. This being the last statement of the contracting parties, there is no room for construction as to what their intention was. They could not, in view of the above, have meant the premium notice law of New York should govern. It was manifestly not their intention. They

had expressly provided in the policy, the latest instrument passing between them, that neither this nor any notice statute of any state should govern. By accepting this policy, the insured clearly intended to limit the special clause in his application, so that this particular law of New York should not govern the contract. This notice law was clearly intended only for the benefit and protection of the insured.

No expression of the Supreme Court of the United States has yet been given from which we are able to determine conclusively what would be its holding upon this question of waiver, where a policy of insurance was, in fact, issued and delivered in New York to a citizen of that state with residence and post office address there, and which would otherwise, were it not for a waiver, be applicable. The contract *having, in fact, been made in Washington*, the rights of the parties cannot be affected by the public policy of the state of New York, whatever that may be. They are affected by the public policy of the state of Washington only. They had liberty of contract there *and were not obliged to contract into the policy any premium notice statute.* Any lawful contract *there made* will be upheld, any unlawful contract or stipulation, defeated. The Court which adjudicates the rights of the parties, under such a contract as this, must seek to arrive at the true intention of the parties, and that intention alone, when lawful, must govern, unaffected by any question of public policy, except that of the State in which *the contract was, in fact, made*, and equally unaffected by any law except as such law expresses a part of *the agreement* which the parties have made, or a rule of interpretation of such agreement. Looking again at the particular facts in this case, for the purpose of ascertaining the intention of the parties: Mr. Hill made an application in Washington, for insur-

ance to the defendant company. In that application he made certain representations and warranties, and in it he agreed that there should be no contract of insurance until a policy had been issued and delivered to him, and the first premium paid; and that the declarations, agreements and warranties contained in the application should be a part of the contract of insurance when made, which contract should be construed to have been made in the City of New York, and which application contained a notice and warning that if any policy was issued he could not rely on a premium notice being sent. Upon this proposal for insurance the Company issued a policy. That policy, in its first sentence referring to the application, and making the same a part of the contract, expressly provided that "*notice that each and every such payment (of premium) is due at the date named in the policy, is given and accepted by the delivery and acceptance of this policy, and any other notice required by any statute, is thereby expressly waived.*" This policy was forwarded to Seattle and tendered to Mr. Hill, the applicant. *If the proper interpretation of the provision in the application, that any contract of insurance to be issued thereon shall at all times and places be construed to have been made in the City of New York, is that the right of the parties shall be governed absolutely by the premium notice law 1877, then the policy issued thereon was not an unqualified acceptance by the Company of the proposal made by the applicant. In the clearest and most unqualified terms it declares that the rights of the parties shall not be governed by any statute on the subject of notice, and that the requirments of any such statute are expressly waived. Hill had asked for a policy in an application which told him he could not rely on notice.* Hill was, therefore, at liberty to reject this policy as not being an unqualified

acceptance of his proposal. When he accepted it, he assented to its terms; he bound himself by all of its conditions and stipulations. It was the last of the constating instruments which made up the contract of the parties. Its provisions were clear; its meaning was unmistakable; its terms consistent with the laws of Washington. There was no room for construction as to what was the intention of the contracting parties. No Court, therefore, should hesitate to give full force and effect to the intention of the parties so clearly and unequivocally expressed in their contract.

If Mr. Warburton claims that the waiver is invalid under the laws of New York then the very fact that the stipulation as to waiver was introduced into the policy is cogent evidence of the intention that the New York statute should not govern, on the principle that when a contract is open to two constructions, the one lawful and the other unlawful, the former must be adopted.

Thus in Missouri S. S. Co., 42 Ch. D. (1889) Chitty J. says, "The circumstance that the stipulations which "the Claimant asks to have struck out of the contracts "are allowed by the law of one country, and disallowed "by the law of the other country, affords a cogent "reason for holding that the parties were contracting "with reference to the law of the country which allowed "and not to the law which disallowed the stipulations. "It is unreasonale to presume that the parties inserted "in the contracts stipulations which they intended "should be nugatory and void."

This decision is upon the well-established principle that when a contract is open to two constructions, the one lawful and the other un'awful, the former must be adopted.

Hobbs *v.* McLean, 117, U. S., 576.
U. S. *v.* Cent. Pac. R. R. 118 U. S., 236.
Burdon Sugar Co. *v.* Payne, 167 U. S., 142.

So in Bank of Kentucky *v.* Adams Express Co., 93 U. S., 181, this court says: "The language is very broad; but it must be construed reasonably, and, if possible, consistently with the law. *It is not to be presumed the parties intended to make a contract which the law does not allow.*"

Also

Ewing *v.* Howard, 7 Wallace, 506.
Lorillard *v.* Clyde, 86 N. Y., 387.

So in Wiggins Ferry Co., *v.* R. R. Co., 128 Mo., 224, where under one construction of a contract, it would have been contrary to public policy and void, it was so construed as to uphold it as a legal contract.

The theory of defendant-in-error that the insurance company is estopped from claiming that the contract was not actually made in the City of New York, can have no controlling effect upon the rights of the parties under the terms of the contract.

Hill, while a resident of Seattle, Washington, made and forwarded to the Insurance Company of New York City, an application for insurance. This application contained an agreement on his part that "the contract of insurance when made shall be held and construed at all times and places to have been made in the City of New York," but also contained warning to him that he could not rely on a notice. Upon this application a policy was in fact issued, which by express reference made the application a part of it. Had there been nothing in the policy about waiving any notice, statute, the legal situation claimed by the plaintiff would have more reason to support it. But in such a case the application of the laws of the State of New York would rest solely upon the convention of the parties. These laws would not operate upon the parties nor control their

rights by their own force, but solely by virtue of the expressed intention of the contracting parties.

In this case, however, the policy which was issued upon the application of Hill contained the express provision that "notice that each and every such payment (of premium) is due at the date named in the policy, is given and accepted by the delivery and acceptance of this policy, and any other notice required by any statute is hereby expressly waived." It is thus made evident that the parties intended that their contract of insurance should not in any wise be controlled or affected by the premium notice statute of the State of New York. The theory of estoppel can, therefore, have no application to this case, the only question involved being the application of the premium notice statute.

(3.) *The claim of the plaintiffs involves the finding of an express intent to make the New York notice statute which has no extra territorial operation, operate extra territorially by agreement, the effect of which would be to change the statute by agreement. This intent is baseless and unreasonable. The statute is drawn with reference to New York business alone.*

The language in the application in the Cohen case *expressed* the intent as to certain laws, the language used being "subject to the charter of such company and the "laws of said State," and this Court in the Cohen case confined the "laws" to those of New York relating to the application, but said "Further, it may be noticed "that even if the language justifies a broader con- "struction, it may well mean only such laws of the "State of New York as are * * * intended to "have extraterritorial application, should be con- "sidered a part of the policy."

This Court had already held that the statute was not intended to have any extra-territorial effect, and hence the parties to the Hill contract did not intend by this clause to make a statute which related solely to the business of collecting premiums in New York State, applicable to such business in Washington.

The broad doctrine of the Cohen case is that the statute did not apply to the business of collecting premiums outside New York State from persons resident outside that State and whose post-office addresses were not within that State, and the clause in question shows no intent to alter such effect of the statute.

If the contention of the plaintiff could be maintained it would necessarily involve an agreement intending to change the statute itself.

For instance, under the statute of 1877, the notice must be served at least 30 days, and under the statutes of 1892 and 1897, at least 15 days. This is an arbitrary time, but *reasonable as the Supreme Court of the United States says as to all policies within the State of New York*, that is as to all insured who reside or have Post Office addresses in New York State, yet the Court goes on and says, that when it is remembered that some at least of the New York Insurance Companies are doing business in all quarters of the globe, it is obvious that a 30 day notice in many cases would be of little avail. The clauses in the Hill application and policy in question did not purport to change the time, therefore the time which is reasonable under the New York statute is by these particular clauses to be made reasonable for Washington, some three thousand miles away, which is unwarrantable. A 15-day notice would be entirely impracticable.

Again, under the ruling of this Court the statutes relate solely to collection of premiums within New York State and where the residence and Post

Office address is in the State of New York. Can it be claimed that this clause applied where there was no collection within New York State and no residence and no Post Office address in the State of New York? Even thongh a policy holder resided and had his Post Office address in Washington, he might yet agree in proper language for a Post office address within the State of New York and declare that a notice should be sent to him under the Statute to some address in New York State, but Hill did nothing of that kind, so that if this clause is to be applied it would be necessary to change the statute by agreement and to consider as made an agreement substituting his Post Office address in Washington for the New York address referred to in the Statute.

Again, the Supreme Court of the United States says: "Further, by Section 2 the Statute provides that an "affidavit by one authorized to mail the notice shall be "'presumptive evidence' of the giving of notice. Can "it be supposed that the Legislature of New York was "contemplating a rule of evidence to be enforced in "every State and Nation of the world?" The contention of the plaintiffs would also involve a change of the statute in this particular, and would contemplate affidavits made in Washington and the changing of the rules of Evidence in the Courts of that State by agreement between the parties.

The argument, therefore, that this clause introduces the New York Premium Notice Statute into the business of collecting premiums in Washington on the Hill policies must either make the statute operative extra territorially, which is expressly opposed to the doctrine of the Supreme Court of the United States, or must involve a change in the terms of the statute by agreement of the parties, and there is no ground whatever for this.

(4.) *The Baxter application and policy were not similar to the Hill application and policy ;* since the special clause in the Baxter policy had the words therein "*and to be executed*", and the application and policy were otherwise different also.

In the Baxter case it was assumed that the New York law applied. There is no discussion whatever in the briefs of counsel whether the law did apply or did not apply.

Counsel for the defendant moved for a non-suit on the ground that the insured had failed to comply with the terms and conditions of the policy by neglecting to pay the quarterly premium stipulated to be paid by the terms of the policy on the 24th day of August prior to the death of the insured. The motion was denied, and no other evidence was given. The Court directed the jury to find a verdict in favor of the plaintiff.

In the Baxter case the policy bore date *May 24th, 1884*, and the insured died *September 7th, 1884*. The defense was that the quarterly premium which had become due August 24th, 1884, was not paid.

The policy was payable to the beneficiary "at the Home Office of said Company, in the City of New York within 60 days after receipt of satisfactory proofs of the death during the continuance of this policy of Joel J. Matteson of Bradford, in the County of McKean, State of Pennsylvania".

There was no direct provision in the policy as to where the premiums were payable, but from its language presumably in New York.

The policy also states, " In witness whereof the Brooklyn Life Insurance Company have by their President and Secretary signed and delivered this contract at the City of New York, in the State of New York, this 24th

day of May, one thousand eight hundred and eighty-four."

On the back of the policy is the following provision:

"6th. This policy *is a contract made and to be executed* in the State of New York, and shall be construed only according to the *laws of that State*, and no suit shall be brought against the Company upon this policy except in the Courts of that State, or in the Circuit or District Courts of the United States, nor shall any such suit be brought after the lapse of one year from the time when the cause of action accrues."

This recital is one of fact, viz, "This policy is a contract made, &c."

There was nothing whatever in the policy or in the case to show that the policy was not applied for and delivered in the State of New York, nor does it appear at all what the Post Office address of Matteson, the insured, was, nor does it clearly appear where he resided.

There is no discussion whatever in any part of the case or in the briefs of counsel that the New York Statute applied, but it was simply assumed that it did.

(5.) *The special clause covers primarily any laws of New York as to declarations, agreements and warranties in the application, and the legal situation is the same in this respect as in the Cohen case.*

The special clause referred to, taken in connection with another clause in the application, similar to that in the Cohen application, has substantially the same effect as that in the Cohen case, and its operation is limited as this Court limited the clause in the Cohen case, viz., saying: "Its meaning is clear and is that no local "statute as to the effect of statements or representa- "tions or any other matter in the application should in "these respects override the provisions of the Charter "and the laws of New York."

The clauses in the Hill application are as follows: "Application to the Mutual Life Insurance Company "of New York for a five year distribution policy sub- "ject to the Charter of said Company and laws of said "State"

Followed by this clause in another part:

"And that if said policy be issued the declarations, "agreements and warranties herein contained shall be "a part thereof, and the contract of insurance when "made shall be held and construed at all times and "places to be made in the City of New York."

It is apparent from this clause that the same doctrine of this Court obtains in this case as did in the Cohen case.

It will be noticed that the provision as to the construction of the contract follows immediately the statement that *the declarations, agreements and warranties in the application* shall be a part of the contract. The only reference to any laws in the Hill application is in the clause similar to the Cohen clause, "application subject to the Charter and Laws, etc."

The effect of the 2d clause, however, is simply that that the declarations, agreements and warranties are subject to the New York Laws relating to statements in application and the effect of warranties whether contained in the application or the policy.

In addition to previous arguments, this also clearly excludes any idea that these clauses have any relation whatever to the business of sending premium notices.

These clauses clearly and conclusively show the parties had their minds upon the *preliminary* part of the contract, the matters embraced within the *application*, respecting the truthfulness and correctness of which the insurance company was compelled to rely upon the applicant, and it was to

bring these statements, representations and warranties under the laws of New York that these clauses were employed. It will be noticed, however, that no reference is made to a *statute of New York, except* as applied to the *application*. It is studiously provided that the statements, representations and warranties made in the application shall be a part of the contract. It is expressly and separately provided that the *application* is subject to the *laws of the State of New York*. The contract as a whole, and the preliminary part of it, the application, are both dealt with in the clause under consideration, while the subject of notice of the due date of premiums is entirely eliminated from consideration in this part of the contract. The contract itself, and not what may subsequently be done in the way of giving notice of when premiums fall due, is here treated of. *The subject of notice is also dealt with expressly and separately.* As to the whole contract, including the application, the parties say it shall, when made, be held and construed to be made in the City of New York, but in addition to that, the preliminary part of the contract shall be *subject to the laws of the State of New York*. The familiar maxim of *expressio unius est exclusio alterius* would eliminate the question of notice from the operation of the New York statutes. Parties stipulate that the contract as a whole, including the application, shall be deemed made in New York, but that part of the contract embraced within the *application*, including the statements, representations and warranties, shall be *subject to the laws of New York*, thereby clearly showing that so far as express provision is concerned, the policy otherwise, shall not be subject to the laws of that State, unless through inference as opposed to express provision it be brought under that statute.

The language employed to effect the two objects we

have recited, to make the preliminary contract so far as relates to the application subject to the laws of the State of New York, and to be construed by them, and to eliminate the statutes respecting the notice of the time of premium, and fix the rights and the relations of the parties in that particular by the express terms of their stipulations and nothing else, was not accidental, but each was treated and made complete in separate parts of the contract. In the case of Mutual Life *vs.* Cohen, 179 U. S., at page 267, in commenting upon this clause relating to the application, the court says:

> "It recites that it is 'subject to the charter of such company and the laws of said State'; and the contract refers to the application, and declares that it is issued 'in consideration of the application for this policy and of the truth of the several statements made therein.' While the contract is based upon the application, yet the latter is only a preliminary instrument, a proposal on the part of the insured, and a stipulation that it shall be controlled by the charter and the laws of the state is not tantamount to a stipulation that the policy issued thereon shall also in like manner be controlled. That such language was incorporated into the application is not strange. Its meaning is clear, and is that no local statute as to the effect of statements or representations or any other matter in the application should in these respects override the provisions of the charter and the laws of New York. In other words, if by the charter or the laws of New York any statement in an application is to be taken as a warranty, no local statute declaring that all statements in an application are to be taken as simply representations, shall override the terms of the charter and the New York law. But that is very different from a provision that the contract issued upon such application should also be in all its respects controlled by the laws of New York."

Had it been the purpose of the parties that the New

York statue respecting notice shall be controlling, it would have been an easy matter to have so provided in the contract. Had such been the intent, the parties would not have expressly stipulated that *no notice whatever* should be given *save* that expressed in the contract; and that that, and *it alone*, should be controlling, "and any further notice required by any statute (whether of New York or Washington) is hereby expressly waived," and instead of such stipulation they would have stipulated expressly, as in the case of the application, that in regard to notice the contract was subject to the laws of the state of New York, and was "to be executed there" as declared in the case of Baxter *vs.* Brooklyn, 119 N. Y.,450, 454. As stated by the Supreme Court in this, as in the Baxter case, the parties would have had a different stipulation, namely, "that the contract *was to be executed* in the State of New York, and construed only according to the laws of that state," or a general provision would have been made that the contract was to be governed in all respects by the laws of New York.

6. Even if the policy had been actually made in the City of New York the notice statute would not have operated upon the business of collecting its premiums in the State of Washington, even if also it had not been waived.

Part performance of the contract was to be in Washington, namely payment of premiums.

The clause is that contract when made shall be construed to have been made in New York. Grant this, but suppose a contract made in New York on life in Italy, resident in Italy, post-office address in Italy, is there any intent that a New York statutory notice of premium due shall be mailed to Italy? Certainly not, as the Supreme Court says. In like manner the Hill

contract in referring to where the contract shall be held to have been *made* does not import an intent that a statutory notice shall be mailed to a resident of the State of Washington, with post office address there.

In the person of its local agent the insurance company was present at Seattle, and so was Hill, the insured, at the time the first premium was paid and the policy delivered and the contract there first came into being. So that in truth and reality the contract was one made in the State of Washington. After being made in the State of Washington, the parties mutually agreed that it should be deemed and construed to be made in New York City. *They resorted to fiction as against fact, and this fiction is invoked in this case for injustice and inequity, to obtain an insurance that never was paid for; to recover that to which no moral claim can be laid.* Fictions are not entertained for such purposes, but only to promote equity and justice.

Gibson v. *Chouteau*, 13 Wallace, 101.
Newhall v. *Sanger*, 92 U. S., 766.
Smith v. *Furbish*, 44 Atl., 408.

Even though by fiction, intendment and convention of the parties, this contract is to be deemed made in New York, that does not debar the parties outside the State of New York from incorporating in it, or expressly withholding from it, any particular law or laws of the State of New York. Their situation is totally different in this respect from that of parties in that, state. The public policy, if there be one, created by the New York statute, cannot and does not reach them in the State of Washington, where they make the contract, and where they are at liberty to adopt in the execution of their contract whatever rule they see fit as to notice. Besides, the statute of New York could have no application iu the making of the contract, to

those in that state, and can have no function whatever to perform until after the contract has been made. At most to persons actually within and contracting insurance within that state, the statute does not purport to operate *upon the contract*, but to operate only upon *one of the parties to it*, and that at a time *subsequent* to its execution.

In the case of the making of the contract outside of the state and deeming it made in New York, it would be by conventional arrangement and not by legislative force, the New York statute would affect the remedy, and not as a matter of public policy. The converse of the proposition might not be true. If the parties were actually within New York, within the territory of the operation of the New York statute, and the insured had a residence and post-office address within that State, it might be claimed to be beyond the power of the parties to stipulate that although the contract in fact came into existence in the State of New York, where the money was paid and the policy delivered, and where the insured had a post-office address, yet in theory and by fiction it should be deemed made in the State of Washington, and that the law of New York relating to notice should not apply. In such case the parties, through their agreement, might be claimed to be attempting to override the will of the legislature, indirectly contravening the legislative policy.

The clause in the application on which the plaintiffs rely merely is to the effect that the contract shall be considered as having been *made* in New York. This particular clause contains nothing concerning performance of the contract in payment by the Company of the amount insured, nor does it say anything concerning performance of conditions by the insured necessary to the continued existence of the contract, such as payment of the premiums.

The natural meaning of the clause in the application is that the making of the contract, *i.e.*, the entering into of the contract, or the creation of the obligation and all the elements involved in this idea, are to be governed and determined by the law of New York, *e. g.* mutual assent and form.

As the clause refers merely to the making of the contract, that is, its initiation, it has nothing to do with the performance of the contract by the Company nor with the performance of conditions by the insured. The clause has reference solely to the *lex loci celebrationis contractus*. It has nothing to do with the *lex loci solutionis*.

This Court in Scudder *vs.* Union National Bank, 91 U. S., 413, well says:

> "Matters bearing upon the execution, the interpretation and the validity of a contract, are determined by the law of the place where the contract was made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitations, depend upon the law of the place where the suit is brought."

In the absence of an agreement upon the subject between the contracting parties, nothing is more natural or reasonable than that the performance of conditions by the insured should be subject to the law of the place where they are to be performed (*lex loci actus*).

Taking the policy and application together as constituting the contract of the parties, we find:

1. An express agreement that New York shall be considered the *locus celebrationis* (place of making) of the contract.

Such express agreement is contained in the application and is as follows: "The contract of insurance when made shall be held and considered at all times and places to have been made in the City of New York."

2. An express agreement that the *locus solutionis* (place of payment or performance) *of the sum insured* shall be the City of New York.

Such express agreement is contained in the policy and is as follows: "The Mutual Life Insurance Company of New York promises to pay at its Home Office in the City of New York unto Ellen Kellogg Hill" etc.

3. An express agreement that the *locus solutionis* (place of payment or performance) *of the premiums* is the City of New York *or elsewhere in exchange for the Company's receipt*, and the proof showed it was Washington.

Such express agreement is contained in the policy and is as follows: "PAYMENT OF PREMIUMS.—Each premium is due and payable at the Home Office of the Company in the City of New York but will be accepted elsewhere when duly paid in exchange for the Company's receipt signed by the President or Secretary."

It was abundantly proved that the first premium was paid in Washington, and that the second was demanded in Washington, and that the practice was to forward the Company's receipt to the Pacific coast and collect premiums there on all such policies.

The Company had the option *to select* the place of performance of the payment of premiums and it selected Washington.

In Minor, Conflict of Laws, Section 155, we find a pertinent statement:

"Three leading elements in every contract.—Each may have a separate situs. * * *

"The essential elements or circumstances, around which all the incidents of contracts revolve are (1) the *making* of the contract; (2) the *consideration* supporting the contract; and (3) the *performance* of the contract * * *".

"Everything relating to the *making* of the contract is to be governed by the *law of the place where it is made;* everything relating to the *performance* of the contract is to be controlled by the law *of the place of performance;* and wherever the legality or the sufficiency of the *consideration* is the subject of inquiry the law of situs of the consideration is to govern * * * . What is the proper law for one purpose connected with the contract may not be the proper law for another purpose. This has been recognized in a New York case (Hibernia National Bank *v.* Lacombe, 84 N. Y., 378), where the court said: "The law of the place of contract *is not necessarily one place. It is the law of all the places to which and for the purposes of which it has reference.* A bill of exchange therefore is to be construed according to the law of each place at which it is contemplated that something is to be done by either of the parties."

The effect of the agreement in the application is merely to determine the place of *making* of the contract. This is merely an agreement as to a fact. It is not at all an agreement as to what law shall be applicable, except that it gives a basis for the application of the legal rule that the law of the place of the making of a contract governs such subjects as mutual assent; offer and acceptance; formal requisites, such as the form and contents of the instrument expressing the contract, signature, revenue stamps, etc.; validity of assent including contractual capacity; mistake or ignorance of

law or fact; fraud and misrepresentation; duress and undue influence.

The clause in the application does not touch the question of the place of *performance* nor the law governing performance. The question, therefore, of what law governs the performance of conditions (such as the payment of premiums) must be determined either by application of the settled rules of law or by reference to other parts of the contract than the application.

And this brings us to the proposition,

7. The intent of the parties, that the premium notice statute should not govern is still further indicated by the application of the lex loci solutionis, as the place of part performance, in respect to the matter which is in dispute, namely, the payment of premiums, was in Washington and not in the State of New York.

In addition to the reasons and arguments heretofore advanced showing that the special clause as to the *making* of the contract, did not make it governed by the New York statute, it is clear that performance in the matter of the collection of premiums was to be in Washington, so that it is to be presumed that the law of Washington governed on this point.

In Hibernia National Bk. *v.* Lacombe, 84 New York, 378, the Court says: "But, again, the law of the place of "contract is not necessarily one place. It is the law of "all the places to which and for the purposes for which "it has reference. A bill of exchange, therefore, is to be "construed according to the laws of *each place at which* "*the contract contemplated that something is to be* "*done by either of the parties.*"

Now in this case we have premiums payable and collectible in Washington at the option of the company and the only premium paid actually collected there, and a statute in New York which this Court has de-

cided has no extra-territorial effect. There are numerous cases in this Court applying the law of the place of performance as the one governing the construction and effect of the contract.

Supervisors *v.* Galbraith, 93 U. S., 214, where the law of New York as *lex loci solutionis* was applied as against the *lex loci celebrationis*, viz.: Mississippi, and a Mississippi statute held not applicable.

In Union National Bank *v.* Chapman, 169 N. Y., 538, it was held as follows: All matters bearing upon the execution [*i.e.*, formation], the interpretation, and the validity of contracts, including the capacity of the parties to contract, are determined by the place where the contract is made, while all matters connected with its performance, including presentation, *notice*, *demand*, etc., are regulated by the law of the place where the contract by its terms is to be performed.

Our contention is that there is no one arbitrary rule which obtains amongst the doctrines of the conflict of laws which can be applied in this case to definitely solve by itself the question whether the non-extraterritorial premium statute of New York controls the collection of premiums. We maintain that the various rules in regard to the *lex loci contractus*, which may be either the *lex loci celebrationis*, or the *lex loci solutionis*, only serve as guides in this case to assist in ascertaining the intention of the parties, and the intention of the parties must be gathered from all the circumstances read in the light of the various principles applicable to the doctrine of conflict of laws. It is impossible to reconcile all the applications of the various doctrines of the conflict of laws in the different States in this country and even in this Court. This is not only owing to the inherent difficulty of the subject, but to the fact that while one rule may seem to indicate the intention of the parties from one point of view, yet from another

point of view a different rule would seem to indicate a different intention. The rule for solving questions such as are presented here lies not in the rigid application of arbitrary rules, but in getting at what on the whole is the intention of the parties. It has been said that "much of the seeming conflict in the adjudications upon the subject of the *lex loci contractus* will disappear by carefully discriminating as to the precise nature of the issue and matter under consideration."

Seamans *vs.* Knapp Co., 89 Wis., 182.

"Whether a French policy would have been so construed is again immaterial. It is no doubt competent to an underwriter on an English policy to stipulate, if he think fit, that such policy shall be construed and applied *in whole or in part* according to the law of any foreign state, as if it had been made in and by a subject of the foreign state, and the policy in question does so stipulate as regards general average, but except when it is so stipulated the policy must be construed according to our law and without regard to the nationality of the vessel. Our judgment is, therefore, for the defendants."

Greer *v.* Poole, Law Reports, 5Q. B., p. 274.

"The learned Judges in the Court below treat the *lex loci solutionis* of the main portion of the contract as conclusively determining that all the rights of the parties under the contract must be governed by the law of that place. I am unable to agree with them in this conclusion. Where a contract is entered into between parties residing in different places, where different systems of law prevail, it is a question, as it appears to me, in each case, with reference to what law the parties contracted *and according to what law it was their inten-*

tion that their rights either under the whole or any part of the contract should be determined. In considering what law is to govern, no doubt the *lex loci solutionis* is a matter of great importance. The *lex loci contractus* is also of importance. In the present case the place of contract was different from the place of its performance. It is not necessary to enter upon the inquiry, which was a good deal discussed at the bar, to which of these considerations the greatest weight is to be attributed, namely, the place where the contract was made, or the place where it is to be performed. In my view they are both matters which must be taken into consideration, *but neither of them is, of itself, conclusive*, and still less is it conclusive, as it appears to me, as to the particular law which was intended to govern particular parts of the contract between the parties. In this case, as in all such cases, the whole of the contract must be looked at and the rights under it must he regulated by the intention of the parties as appearing from the contract. It is perfectly competent to those who, under such circumstances as I have indicated are entering into a contract, to indicate by the terms which they employ, which system of law they intend to be applied to the construction of the contract and to the determination of the rights arising out of it."

Hamlyn & Co. *v.* Talisker Distillery, Law Reports [1894], Appeal Cases, p. 207 (House of Lords).

The broad rule is that the law of a country where a contract is made presumably governs the nature, the obligation and the interpretation of it, unless the contrary appears to be the express intention of the parties. "The general rule," says Lord MANSFIELD, "established *ex comitate et jure gentium* is that the place

where the contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract. But this rule admits of an exception where the parties at the time of making the contract had a view to a different kingdom"; Robinson *v.* Bland (1): (see Peninsular and Oriental Steam Navigation Co. *v.* Shand). (2) This principle was explained by the Exchequer Chamber in the case of Lloyd *v.* Guibert (3), as follows: "It is generally agreed that the law of the place where the contract is made is *prima facie* that which the parties intended, or ought to be presumed to have adopted as the footing upon which they dealt, and that such law ought, therefore, to prevail in the absence of circumstances indicating a different intention, as, for instance, that the contract is to be entirely performed elsewhere, or that the subject-matter is immovable property situate in another country, and so forth; which latter, though sometimes treated as distinct rules, appear more properly to be classed as exceptions to the more general one, by reason of the circumstances indicating an intention to be bound by a law different from that of the place where the contract is made; which intention is inferred from the subject-matter and from the surrounding circumstances so far as they are relevant to construe and determine the character of the contract". It is obvious, however, that the subject-matter of each contract must be looked at as well as the residence of the contracting parties or the place where the contract is made. The place of performance is necessarily in many cases the place where the obligations of the contract will have to be enforced, and hence, as well as for other reasons, has been introduced another canon of construction, to the effect that the law of the place of fulfillment of a contract determines its obligations. But this maxim, as well as the former, must of course give

way to any inference that can legitimately be drawn from the character of the contract and the nature of the transaction. In most cases no doubt where a contract has to be wholly performed abroad, the reasonable presumption may be that it is intended to be a foreign contract determined by foreign law; but this *prima facie* view is in its turn capable of being rebutted by the expressed or implied intention of the parties as deduced from other circumstances. *Again, it may be that the contract is partly to be performed in one place and partly in another.* In such a case the only certain guide is to be found in applying sound ideas of business, convenience, and sense to the language of the contract itself, with a view to discovering from it the true intention of the parties. Even in respect of any performance that is to take place abroad, the parties may still have desired that their liabilities and obligations shall be governed by English law; or it may be that they have intended to incorporate the foreign law to regulate the method and manner of performance abroad, without altering any of the incidents which attach to the contract according to English law. Stereotyped rules laid down by juridcal writers cannot, therefore, be accepted as infallible canons of interpretation in these days, when commercial transactions have altered in character and increased in complexity; and there can be no hard and-fast rule by which to construe the multiform commercial agreements with which in modern times we have to deal Jacobs *v.* Crédit Lyonnais, Law Reports, 12 Q. B. Div., 600.

In Bottomley *v.* Metropolitan Life Ins. Co., 170 Mass., 274, the Court, in considering a policy issued by a New York Company to a resident of Rhode Island, used the following language:

> "There can be little doubt that this policy was a "Rhode Island contract. * * * Not only was

"the assured a resident of Rhode Island, but the "probable place of performance was also there. "* * * The place of performance will ordinar- "ily be deemed the place of a contract, unless the "parties intended otherwise."

In Pritchard *v.* Norton, 106 U. S., 136, MATTHEWS, J., quotes Marshall:

"The principle that in every forum a contract is "governed by the law with a view to which it was "made."

We think we can challenge the counsel for Hill in this case to produce a single instance where a non-extraterritorial statute has been given extra-territorial operation simply because the contract contained a clause stating that it should be considered to have been *made* within the same jurisdiction as that of the non-extraterritorial statute. A consideration of some of the cases cited by Mr. Warburton would show, we think, the impossibility of reaching the real intention of the parties by applying any one arbitrary rule.

In the Pollard case the Virginia Court held that the contract of an Ohio company which contained a clause similar to that in the Hill case having been made with reference to the laws of the State of Ohio, the plaintiff had a right to rely upon them in enforcing his contract so far as they related to its validity, nature, interpretation and effect. The Virginia Court thereupon applied the Ohio statute to the Ohio company in regard to the materiality as warranted to certain answers in the application. The statute law of Ohio in regard to the materiality of answers in the application has no analogy to the premium notice statute of New York expressly decided by this Court to have no extra-territorial operation.

In the Goodwin case the Iowa Court considered

whether the Iowa statute in regard to the attaching of application applied to the contract before it. The Court held that the contract was either a Nebraska contract or a New York contract, and then said that as there was no proof on the subject it would assume that the law of New York was the same as the *lex fori*, therefore the application should have been attached. This also is in no sense giving a non-extraterritorial statute an extraterritorial effect by convention of the parties.

In the case of Penn Mutual *v.* Mechanics Savings Bank, in 72 Fed., there was an agreement in the policy that "the place of contract shall be the City of Philadelphia." The expression "place of contract" is entirely different from the agreement in the Hill application to the effect that the contract shall be considered to have been *made* in New York. "Place of contract" includes any and all places where anything is to be done under the contract as well as place of making of the contract. This clearly appears from the opinion in Pritchard *v.* Norton, 106 U. S., 136, quoted below.

In the Hume Case, 128 U. S., there was an agreement in the policy of a Kentucky corporation that the policy was to be in all respects construed and determined in accordance with the laws of Kentucky and the statute of Kentucky which the Court applied was itself printed on the policy. Under these circumstances there could be no question, of course, whether such statute was applicable or not.

In the Griesemer case the policy contained a clause wholly unlike that in this Hill case, viz., "This policy is a contract made *and to be executed* in the State of New York and shall be construed only according to the charter of the Company and the laws of that State". And the Court says: *from which it clearly appears*

that it was the intent of the parties to locate the place of its execution in the State of New York.

The plaintiff quotes the opinion of Mr. Justice Harlan in the case of Coghlan *vs.* Railway Company, 142 U. S., page 101, where Mr. Justice Harlan quotes Lord Mansfield as saying: "That the law of the place can "never be the rule when the transaction is entered into "with an express view to the law of another country as the "rule by which it is to be governed". In this statement Mr. Justice Harlan takes precisely the position we take here, namely, that the intention of the parties on the whole contract plainly shows that the New York Premium Notice shall not govern and rebuts every contrary presumption.

Mr. Justice HARLAN says:

> "The only basis for this contention is the mere "fact that the bonds purport to have been made in "that State, but that fact is not conclusive. All "the terms of the contract must be examined, in "connection with the attendant circumstances, to "ascertain what law was in the view of the parties "when the contract was executed."

And shortly after this the learned Justice in the same opinion says: "What law, then, did the parties have in "view as determining the legal consequences resulting "from the non-performance of the contract between "them. Presumptively the law of England, where the "contract was to be entirely performed," whereas, Mr. Justice Brewer, in the Cohen case, said, the presumption is in favor of the law of the place of the contract. We presume by this that Mr. Justice Brewer means the *lex loci celebrationis*, not the *lex loci solutionis*, although the latter may have been meant.

Mr. Justice MATTHEWS said in Pritchard *vs.* Norton, 106 U. S., 136: "The phrase *lex loci contractus* is used

" in a double sense, to mean, sometimes, the law of the " place where a contract is entered into; sometimes, " that of the place of its performance."

In the London Assurance case Mr. Justice Peckham's attention was directed entirely to the law of the place of performance, but all cases relating to the application of the law of the place of performance is in the Company's favor, as the question at bar is one relating to the performance of the payment of premiums by the insured, which under the contract should take place in the State of Washington.

In the Johnson case, 78 Northwestern, 905, the stipulation was, as Mr. Warburton says, that the contract should be construed and *governed by the laws of New York*, which is an entirely different clause to that contained in the Hill case, which only refers to a convention as to where the contract was made, and it must always be remembered that while it is true, as this Court said in the Coghlan case, that the presumption is favor of the place of the contract, this Court has also said, there is no room for inference or presumption as to what the intention was when it was expressed in the contract.

Pritchard *vs.* Norton, 106 U. S., 124.

Our claim is that the whole contract taken together and the fact that the statute in question does not operate extra-territorially, rebuts any inference and presumption which might be drawn by applying arbitrary rules to this contract.

In Pinney *v.* Nelson, 183 U. S., 148, this court held that the fact that parties to a contract had in view some other law than that of the place of execution (*lex loci celebrationis*) may be shown by reference to the terms of the contract and purpose with which it was made.

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There is nothing in the case of Knott *v.* Botany Mills, 179 U. S., 59, which conflicts with the principles of the cases above cited. In the Knott case the statute involved was the "Harter Act" forbidding carriers to exempt themselves from responsibility for loss or damage arising from their negligence, and in effect declaring that any stipulation for such exemption was void as against public policy. In the New York premium notice statute there is no such declaration.

In the case of Mortgage Company *v.* Jefferson, 79 Miss., 778 (1892), the Court spoke as follows:

"The presumption of law is always in favor of the "legality of purpose and motive of contracting parties; "and where a contract is made in one state, to be exe- "cuted in another, and, under the laws of one would "be illegal and under those of the other legal, it is "reasonable to presume that the *parties intended their* "*contract to be controlled by the laws of the state in* "*which it would be valid*, and so the courts will, in fur- "therance of a presumed lawful intention, assign it to "that state by which its validity will be upheld."

POINT III.

Although the New York statute does not under the circumstances control, yet, even if the business of collecting the premiums was NewYork business controlled by such statute, the children of Hill, beneficiaries in the policy, are concluded by the failure to pay the premiums, Hill having had the equivalent of statutory notice and waived the same.

This case was decided in this Court at the same time as the Phinney, Allen and Sears (but prior to the Cohen case), and in this case, as well as in those, this Court deemed it unnecessary at that time to decide whether the premium notice statute of New York was applicable or not.

The Court says in the Cohen case, per Mr. Justice Brewer: "In the opinion (that is in the Phinney "case) we referred to the fact that there was a primary "question of the applicability of a statute of the State "of New York, but deemed it unnecessary to decide it. "That decision was followed by the case of the same "Company against Sears, 178 U. S., 345; *against Hill*, "*id.*, 347; against Allen, *id.*, 351, *all of which cases* "*were disposed of in like manner.*"

In the Cohen case it was decided that the premium notice statute of New York was not applicable, and that decision absolutely governs this case as shown in Point II above, the only contrary contention as to any point of difference by the plaintiffs being as to the effect of the particular clause in the Hill Policy above referred to in Point II. While we do not think it really necessary, in view of the inapplicability of the New

York statute, to argue the proposition stated above as Point III, yet as counsel makes the point it seems necessary to take it up.

(1.) *The opposing claim is that if the premium notice statute governs, then the children can recover, because the Cohen case has so decided, but no such point was either discussed or decided in the Cohen case.*

The only question in the Cohen case in the Supreme Court of the United States was whether the law of New York controlled. The Court held it did not.

The logical order of the questions involved was:

1st. Did the law apply?

2d. If it did apply, what was its effect in the particular case before the Court?

In the Phinney, Allen, Hill, and Sears cases the Court chose to take up the 2d question, and decided on the demurrers that it had no effect because policies were abandoned.

In the Cohen case the Court deemed it proper to take up the first and primary question of the extra-territorial operation of the statute, evidently, because the allegations in the Cohen answer were not sufficiently full to raise other questions. At the same time the Supreme Court of the United States did not really discuss at all the question of the position of the beneficiary. Therefore, so far as the Cohen and other cases are concerned, the question is entirely passed over by the Supreme Court of the United States.

In the Hill case in the Supreme Court of the United States the Court said:

> "It is doubtless an interesting question how far "the action of the insured can affect or bind the "beneficiaries in a life insurance policy. If the "answer in this case contained simply the allega-

"tion in respect to the insured's agreement with
"the company, we should be compelled to enter
"into an examination of that question."

The Cohen answer contained no allegations respecting Mrs. Cohen. The allegations were that Cohen neglected, failed, and refused to pay the premiums, that the policy was by Cohen suffered to lapse and become forfeited. No question could arise therefore in the Cohen case as to the effect of the notice to and the abandonment by the insured on the rights of Tine Cohen. There was no foundation laid for a discussion by the Court of the "interesting question". The Cohen pleadings were entirely barren of allegations similar to those contained in the Hill case, and the question therefore as to the effect of the notice to and abandonment by Hill and failure to pay by anyone is entirely an open question in this Court. When this Court says in the Cohen case that the notice was not given, and that hence, if the law of New York controlled, the policy was still in force and the plaintiff was entitled to recover, it referred only to what was before it on the demurrer to the answer, *which contained no allegation whatever relative to Mrs. Cohen, the plaintiff. Mr. Warburton does not notice that the pleadings being silent as to Mrs. Cohen, there was no claim by the Company that she was bound by Cohen's actions.*

To hold otherwise in regard to the opinion of the Supreme Court of the United States would be to strain such opinion far beyond its natural trend and effect.

There is not an element of equity or natural justice in this claim, but, on the contrary, it is repugnant to both justice and equity for nothing whatever was given as a basis for the recovery of a death loss following four years of defaulted premiums. There was no surplus or accumulation that could

carry this insurance beyond the one year for which it was paid. The plaintiffs asked the contract performing or persistent policyholders to pay out of a fund belonging to them insurance that was never purchased. It is not a case of which of two innocent persons shall be the sufferer, but purely and simply a demand without consideration;—a claim for contribution where no equivalent or partial equivalent has been given. It is the asking of inequity upon the basis of injustice, and seeking to make those who have met their contributions reward those who have failed. It is no wonder then, that in the light of such glaring and rank injustice, the Supreme Court was unwilling, though the question was not argued, to pass such a condition of affairs altogether unnoticed in a similar case, lest in doing so it might seem indifferent to the inequity.

(2.) *Hill failed to pay the premium after actual notice to him and abandoned the contract.*

Such non-payment by Hill terminated the contract as against the children, as no one else in their behalf performed the necessary condition of payment.

The Hill policy provides that if the wife be not living, then payment shall be made "to such of the children of "their bodies as shall be living at the death of the said "wife or to their guardian."

Mrs. Hill died February 14th, 1887, while said policy was in force, so that on April 29th, 1887, when the second premium became due and default was made, the children were the beneficiaries.

The only persons, therefore, whose actions have to be discussed are (1) Hill himself, (2) Hill's children.

This question must be approached from the point of view of this Court, which has laid down a doctrine in consonance with the peculiar nature of life insurance business and its principles.

In the case of Sears, 178 U. S. Supreme Court, 345, Mr. Justice Brewer, uttering the unanimous opinion of the court, places a different and opposite construction upon this statute from that of the learned counsel for Hill when he says:

"As we held in a prior case (Phinney), there is nothing in the statute of New York (if controlling at all) to prevent the parties from dealing with that as any other contract, and if they chose to abandon it, that action is conclusive."

It is thus seen that even if this contract had been actually made in the State of New York by parties there resident, and with post office address there, and the premiums solely payable in New York, this regulating statute of that State as to notice does not absolutely dominate the contract. It is merely a regulation of business, to be continued, altered or repealed at the pleasure of the legislature. It does not purport to affect or curtail the contracting power of the parties to policies of insurance. That statute not only left the contracting parties free and unembarrassed in what they might mutually do or omit to do, as if it had never been enacted, but left the insured equally unfettered; so that by mutual consent or abandonment, notwithstanding the statute, they could terminate the contract in any manner they saw fit. Their dealings toward each other would leave this contract as any other—and whatever would operate as a waiver or abandonment of any other contract, would be equally effectual with this policy of insurance.

The same view of this Court is upheld in the Allen case, 178 U. S., 351, in which this court says:

"From this answer it distinctly appears that Stewart, who was both the insured and the beneficiary, knew when the second annual premium became due, was informed of his default in the matter of payment, and

both he and the company agreed to the ending of the contract."

It follows from these enunciations of the law that the statute of New York does not enter into the contract in the sense that the policy cannot be abandoned by the insured except after notice sent. The New York statute does not in any manner impair this power of the insured.

In the Cohen, case, 179, U. S., 262, this Court reaches the conclusion that the New York statute does not enter into the charter of the company. The Court says:

"Undoubtedly a foreign insurance company making a contract within the State of New York would find that contract burdened by its provisions, and equally clear is it that such company making a contract in another State would be free from its limitations. There is no indication of an intent on the part of the Legislature of New York to affect, even if it were possible, the general powers of a foreign company coming within the State and transacting business. But on the face of the statute there is no express demarcation between foreign and local companies. There is no attempt to say that a foreign company doing business within the State shall, as to such business, be subject to the prescribed limitations, and that a home company doing business within the State and elsewhere, shall as to all its business be so limited. If we cannot from the language impute to the Legislature an intent to regulate the business of a foreign company outside of the State, how can we find in such language an intent to prescribe limitations upon the contracts of a home company outside the State?"

"And, again," says the Court, "it is worthy of notice that the State of New York has changed its legislation repeatedly in the last quarter of a century in respect to this very matter of notice."

"See Laws of 1876, Chap. 341, Sec. 1; the statute now under consideration, Laws of 1877; Laws of 1892, Chap. 690, Sec. 92. Laws of 1897, Chap. 218, Sec. 92.

The varying provisions of these statutes directed in terms not to local companies, but to companies doing business in the State of New York, strengthens the conclusion that the State was not thus changing the several charters of its companies, but prescribing only that which in its judgment from time to time was the proper rule for business transacted within the State."

The same view of the functions of the New York statute is forcibly presented by Hammond, J., in Rosenplanter *vs.* Provident Savings Life Assurance Society, 91 Fed., at pp. 733-4, as follows:

"If the provisions of the statute as to notice had been written in the policy as agreements of the parties, that would have been their contract, and, of course, the law could not make another contract for them; wherefore it would be enforced by the courts as the agreement of the parties. But the statute did not undertake to make a contract of insurance for the parties. It was only a statutory regulation for the government of insurance companies, compelling them to give notice, as required by the act, of the non-payment of premiums, before they would be allowed to declare a policy forfeited according to its stipulations. It was a regulation that the Legislature had a right to make. It was a beneficent regulation for the relief against a forfeiture created under the contract, which it was entirely competent for the Legislature to withdraw, alter or amend, as to it might seem best. Surely, if we turn the principle contended for the other way, its operation would be denied by the plaintiff and her counsel; that is to say, if an insurance company should contend that at the time of the passage of the act it had already issued a policy dfining the terms of forfeiture, and that it was not within the power of the Legislature to impair the obligation of that contract, by importing into it a different stipulation or provision as to the conditions of forfeiture, the beneficiaries would deny that such legislation unconstitutionally impaired the obligation, but if the Legislature has the power to import into an existing contract such a regulation for giving notice without impairing the obligation of the contract as to insurance compan-

ies, it has the right to take it away, by repeal, without impairing the obligation as to the beneficiary."

In this case this Court recognized on demurrer not only that the insured and the Company could abandon the contract, but also that the beneficiaries could refuse to continue, but as this Court has never *considered the position of a beneficiary in a New York case to which the statute applied*, we can show that any remarks in the Cohen case on this point were merely *obiter*.

There is no question, therefore, but that the Hill contract could have been terminated without the premium notice having been sent.

A cardinal thought to be always kept in mind is that Hill, as statutory agent, could *deal with the notice*, whatever views may be held whether he could *deal with the contract* as against beneficiaries.

The premium notice statute provides for notice to the insured, not to the beneficiary. *The insured is made the statutory agent for all parties interested* unless the policy has been assigned. The New York Court of Appeals has so declared. In Schneider *vs.* U. S. Life, 123 New York, 112, the Court holds, under the Act of 1877, as follows: "*This notice was served upon the husband* "*who had the policy in his possession, and who was* "*the agent of his wife for the purpose of receiving the* "*notice.*" This is based upon the theory that the insured is the one primarily and voluntarily responsible for the insurance, which is usually for himself or those dependent on him. The statute is thus based upon the assumption that the insured is the person who is going to pay the premiums, unless the policy is assigned.

On this point the Supreme Court of New York has said in Rowe *vs.* Brooklyn Life, 11 App. Div., 537: "No valid reason can be suggested why it was not com- "petent for the Legislature, in accordance with the

"usual practice in insurance cases, to provide that the "notice to be given should be addressed to the party "whose life is assured. It is generally understood that "the person whose life is assured, more frequently than "any other person, pays the premium to procure, as "well as the premium to continue in force the policy "issued upon his life."

The insured has full power apart from any question of notice to abandon the policy. The design of the statute requiring notice is that the *insured* shall be notified of the approaching due date of the premium so that there may be no question of his having the opportunity to pay if he desires. The object of giving notice is to warn the *insured* of the danger of lapse.

Hill actually knew when the premium was due and declined to pay it.

Hill signed an application dated April 28, 1886, which stated that the premium was payable *annually*. By the terms of the application itself this particular formed a part of the contract with the Company. The contract itself stated that the annual premium of $814 should be paid every year on April 29th.

It is well settled that the contents of a writing signed by a party himself or by another at his request are presumed to be known to him (Lawson on Law of Presumptive Evidence, p. 18), and Hill is bound by the contents of the application and policy and presumed to know them. See Travelers' Insurance Company *vs.* Henderson, 32 U. S. Appeals, 547, also Union Central Life Ins. Co., *vs.* Hook, 56 N. E. Rep., 907.

Hill did not pay in 1887, or 1888, or 1889, or 1890, after which he died. *Hill was personally solicited to pay the second premium due April 29, 1887, but could not pay it* (Rec., pp. 102, *et seq.*). He must be presumed to have intended the contractual consequences of his own act namely "if this policy shall become void for

non-payment of premium, all payments previously made shall be forfeited to the Company."

His bad financial condition in 1887 and 1888 furnish the explanation of this abandonment.

Hill received actual personal notice. The renewal receipt was itself tendered to him on more than one occasion. His acts indicate his intention. His failure to pay indicated his attention to abandon. He was solicited repeatedly to pay the second premium, and on each occasion expressed his inability to do so and thus to continue the policy in force. A notice given to him under the statute would, therefore, have been an utterly useless formality.

"It is one of the maxims of the common law, and which is a dictate of common sense, that the law will not attempt to do an act which would be in vain, or to enforce an act which would be frivolous. *Lex nil frusta facit. Lex non cogit ad vana seu inutilia.*" Trustees of Huntington *vs.* Nicoll, 3 Johnson's Reports, 506.

It is well settled in the case of replevin where a demand is necessary, that if it appears a demand would have been unavailing then evidence of the demand is not required.

So in the report of the case of The King *vs.* Bishop of London, 13 East's Reports, 419, there is a note of a case where if a certain license were granted it would have no effect. In such a case the Court would not interpose, nor command, etc., *lex non cogit ad inutilia.*

So in a case where the Court held a formal levy by the Sheriff not required because of no effect, the same maxim was applied.

So in Lent *vs.* Padelford, 10 Massachusetts Reports, 239, the Court will not require "a fruitless ceremony."

The law does not require the doing of idle and useless things.

Where there is actual notice, as in this case, the infraction of the strict letter of the law becomes trifling, and the maxim *de minimis* applies.

Since Hill was the only person recognized by the law as entitled to notice, he could accept actual notice and waive the formality of sending one by mail.

When demand for the payment was made and the renewal receipt tendered him, his conduct necessarily amounted to such waiver, and his continued failure and refusal to pay for four successive annual premium periods constituted a clear abandonment.

All the presumptions and evidence therefore establish an intention to abandon and an abandonment of this insurance, and there was not a scintilla of evidence showing a desire or intention to keep it alive.

So in Lone *vs.* Mutual Life, quoted above neglect to pay premiums for so long a time is conclusive evidence of abandonment.

Actual knowledge by the insured of the premium being due possessed and acted upon by Hill, and actual dealings respecting the payment of the premium was equivalent to serving the statutory notice if required at all in this case.

It was established as a fact by the undisputed evidence in this case that at the maturity of the premium for 1887 Hill had full notice.

We submit that any notice given, recognized and acted upon by the assured as notice, constitutes a substantial and effective compliance with the statute.

If Mr. Hill did not object to its sufficiency as notice at the time, but on the contrary accepted the same as a proper notice, those whom he represented can not now be heard to say that said notice was insufficient as a compliance with said statute.

Johnson *vs.* Oppenheim, 55 N. Y., 280, 291.
Bryant *vs.* Goodnow, 5 Pickering (Mass.), 228.

As CLIFFORD, J., held in the Desmazes case, the statute could be waived not only expressly, but impliedly, by assuming a position inconsistent with an intention to claim its benefit.

See Weymouth *vs.* Gorham, 22 Maine, 385.
York *vs.* Penobscott, 2 Greenleaf (Me.), 1.

In Johnson *vs.* Oppenheim, this principle is thus stated: "When some formal act or acts are to be performed by a party as a condition precedent to some "right, or to perfect a right of action or property, and "the act as performed is defective or imperfect, and "the adverse party whose right it is to object and insist upon a more perfect compliance with the condition, makes no objection to the manner of its performance, but accepting the performance as perfect, places "his objection to the claim and right asserted upon "another distinct and independent ground, he is held "to have waived all objection to the formal or technical "defects. The rule rests upon the ground that the "party by his silence has misled his adversary, and not "having spoken when he ought, shall not be permitted to speak when he would. The principle has "its most frequent application in actions upon policies of "insurance, where there have been some defects in the "preliminary proof of loss of interest, which have not "been objected to, but the claim has been resisted on "other grounds."

The parties to a policy of insurance by law stand upon the same footing, and the same principles of law apply to the insured as to the insurer; and if the insurer may waive rights by receiving, accepting and acting upon notices, proofs of loss, etc., defective in form and insufficient in point of time, can not the insured likewise bind himself and those whom he represents as statutory agent by the same conduct with reference to

notice required, either by the law or his contract? Certainly, it is not the law that the rights of the different parties to the same contract are to be measured by dissimilar rules and standards. The same rule should work both ways.

> "Waiver is a voluntary relinquishment or renunciation of some "right, a foregoing or giving up of some benefit or advantage, which, "but for such waiver he would have enjoyed. It may be proved by "express declaration, or by acts and declarations manifesting an "intent and purpose not to claim the supposed advantage; or by a "course of acts and conduct, or by so neglecting and failing to act as "to induce a belief that it was his intention and purpose to waive "* * * It may be proved by various species of proofs and evidence "by declarations, by acts, and by nonfeasance or forbearing to claim "or act; but, however proved, the question is: has he willingly "given up and forborne to claim the benefit of the conditions?"
>
> Farlow v. Ellis, 15 Gray, 231.

The Maine cases above cited are both cases wherein a *notice required by statute* to be in a particular form was informal; and the party receiving the same having made no objection to the form of the notice at the time of its receipt, and having acted thereon, it was held that the statute was substantially complied with, and that the notice was sufficient.

The defendant in error cites some cases in New York to show that the statutory form of notice must be followed. None of the cases touch the facts in this case, or what is the effect of receipt of actual notice and an actual response thereto, such as was made in this case.

The Court in the Phelan case expressiy held simply that the irregular notice *was never received.*

In the Carter case notice was sent to another person.

Actual notice meets the object of the statute.

The object of the premium notice statute of New York is variously stated as follows:

To prevent lapse without notice and an opportunity to pay (Baxter *v.* Brooklyn Life, 119 N. Y., 456).

Notice is intended "to remind" the insured. The statute was not meant to operate harshly upon the Company. "The obligation of the statute must not be unreasonably insisted upon" (McDougall *v.* Society, 135 N. Y., 456).

Most of the cases on this subject state that the object is simply to prevent "forgetfulness" or "misapprehension" as to time of payment.

Most of the cases where the form of notice is enquired into are cases where the company proved simply the mailing of the notice, but proved no actual notice. In such cases, of course, if the statute applies, the form may be important.

In one case, Trimble *v.* New York Life, 55 Pacific Reporter, 429, decided in the State of Washington in 1898, the question was simply on the form of notice which was mailed, and there was no question of actual notice. In stating the object, the Court says:

"While it was probably true that the law was made "for the benefit of the assured, it was evidently in- "tended as a reminder to him of the coming due of the "premium, so that he might not unawares, or through a "fault of memory, allow his policy to lapse, and forfeit "his rights under the contract, upon which he had al- "ready paid out money; and when the notice which "was sent in this case was received by the insured, it "seems clear that the object of the law was met, and that "his attention was called to the fact that the premium "was about to become due, and to the further fact that, "if it was not paid within a certain time it would be for- "feited."

* * * * *

"The evident intention of the law, we think, how- "ever, was not to apprise him of the amount which "was due, but of the time when the amount became "due. While the statute was no doubt enacted for

"the benefit of people who insured in these cases,
"the law recognizing the fact that they were not people
"who were expert or careful in transacting business,
"yet it evidently was not the intention to make the
"law operate oppressively upon the insurance compa-
"nies, but was enacted simply in the interest of justice.
"While Courts have always been ready to protect the
"assured from oppressive and technical conditions
"which are frequently incorporated in insurance poli-
"cies, and are misleading to the untrained mind, this
"provision of the law does not need any strained or ex-
"tended construction to effectuate that protection."

* * * * *

"The plaintiff has no equities in this case, and, if he
"recovers at all, it must be upon his strict legal rights.
"We think such rights have not been shown, under
"the facts proven, and that he has no just or legal de-
"mand against the appellant."

The logical result of this abandonment and the legal and business propriety of the position taken by the Company is clearly seen when we consider the nature of the contract.

Assuming the statute governed, then, had Hill had no notice whatever of the premium being due, an entirely different question would have been presented.

Upon the trial of this case the affirmative defense was made that the Mutual Life Insurance Company is a mutual life insurance association; that its membership consists of its persistent policy-holders; that the fund out of which its losses are paid is supplied from payment of premiums, and that every premium-paying policy-holder has an interest in the fund thus accumulated, out of which, in case of death, his policy is to be paid and credit is to be given him by way of deduction upon annual premiums or an increase of insurance; that out of his performance of his contract of contribution to the common fund comes the right of recovery in case of death; that the fund from which such recov-

ery is had is the property of the Company for the benefit of all the persistent members. As this Court said in the Phinney case (178 U. S., 344) the contract, "although in terms a contract with a corporation it is in substance a contract between the insured and all other members of that Company." This defense was substantiated upon the trial by offering in evidence the charter of the company, showing such to be the fact, and the testimony of witnesses to the practice of the company. The action is substantially in the nature of a specific performance; that the policy-holder having contributed by way of premiums his quota, his beneficiaries are entitled by way of distribution or contribution from fellow-members of the association, to the amount of the policy in case of death. It was shown in this case, as already stated, that but one annual premium had been paid upon the delivery of the policy; that in April, 1887, when the second annual premium fell due, the official renewal receipt for the same was tendered the insured and repeated opportunities given him of making payment all of which he knowingly and with full information failed to avail himself of, but, on the contrary, from lack of means or other private motive, declined to make the payment. As a member of the association, as well as by the express terms of his contract, he was informed that with the failure to contribute the right of recovery ended. Notwithstanding this knowledge and these facts, he continued in default through the following successive years, to the time of his death. The beneficiaries, as will be shown, neither made nor offered payment of premiums, but in the face of the confessed defaults ask contribution from the associate members of the full amount of the policy.

In any other relation the parties would have no standing for the enforcement of such a claim. Why should

it be given them in the case of a mutual life insurance company?

The Supreme Court has likened this case to a suit for specific performance. If we follow the analogies of the law of specific performance, the plaintiffs would have no standing in court, because, first, there is a lack of mutuality which is essential to such a suit. The insurance company could not have compelled payment of premiums as they fell due in the years 1887, 1888, 1889 and 1890, for the reason that there was no obligation on the part of anyone to pay such premiums. In Marble Co. *vs.* Ripley, 10 Wallace, 359, it is said:

> "Another reason why specific performance should not be decreed in this case is found in the want of mutuality. Such performance by Ripley could not be decreed or enforced at the suit of the marble company, for the contract expressly stipulates that he may relinquish the business and abandon the contract at any time on giving one year's notice. And it is a general principle that when, from personal incapacity, the nature of the contract, or any other cause, a contract is incapable of being enforced against one party, that party is equally incapable of enforcing it specifically against the other, though its execution in the latter way might in itself be free from the difficulty attending its execution in the former." P. 359.

And, second, because there has been default in payment of the premiums for these four consecutive years, and to enforce the contracts plaintiff's should show either the payment of the premiums or the valid offer of payment. On the contrary, their reply sets forth that they never paid or tendered, or caused to be paid or tendered, any but the first annual premium, and will not assert that either payment or offer of payment was made by the insured George Dana Hill. The proofs in the case are undisputed that no such payment or offer

ever was made, but on the contrary that neither payment nor offer of payment was made, but that upon repeated tender of the renewal receipt for the second annual premium, the insured, with full knowledge, failed to make such payment, and continued the failure to the time of his death.

In Kelsey *vs.* Crowther, 162 U. S., 404, it was said:

> "The action was in the nature of a bill for specific performance of a contract for the sale and purchase of a tract of land. If the contract is construed as making it the duty of Crowther to tender the abstract, yet his failure to do so did not dispense with performance or the offer to perform on the part of the complainants. His failure to furnish the abstract might have justified the complainants in declaring themselves off from the contract, and might have formed a successful defense to an action for damages brought by Crowther. But if they wished to specifically enforce the contract it was necessary for the complainants themselves to tender performance."

In Walsh *vs.* Preston, 109 U. S., 297, the court, at page 318, says:

> "The failure on the part of the party applying for it to perform his own part of a contract wholly executory, or to show any sufficient reason for the failure, has always been held to be ground to refuse relief and turn the party over to his action at law."

Third, because in no event is relief in the nature of specific performance granted except for the purpose of meting out equity and justice.

In McCabe *vs.* Matthews, 155 U. S., 550, Justice BREWER states the rule as follows:

> "A decree for the specific performance of a contract for the sale of real estate does not go as a matter of course, but is granted or withheld ac-

cording as equity and justice seem to demand in view of all the circumstances of the case."

Pratt vs. *Carroll*, 8 Cranch., 471.
Holt vs. *Rogers*, 8 Pet., 420.
Willard vs. *Tayloe*, 8 Wall., 557.
Hennessy vs. *Woolworth*, 128 U. S., 438.

It has already been demonstrated by the opinions of this Court that the notice statute of New York is neither a part of the charter, nor imported by legislative authority into every contract of insurance entered into by a New York Company; but that it is external to it, and a local legislative regulation, subject to modification or repeal, independently of existing contracts. Had the legislature entirely repealed this statute after the policy in this case was made, (assuming it applied) and before the second annual premium fell due, it could not be questioned but that the parties to the contract would be bound by the stipulations of the agreement and would have to abide the consequences of non-performance of its conditions as in the case of other contracts.

What were the obligations of the contract? Absolute upon the part of the insurance company to pay the loss —upon performance of the conditions by the insured; but upon the part of the insured there was no obligation to continue the contract. Payment of annual premiums was not undertaken by him. So long as he saw fit to exercise the privilege or right of paying premiums the company was obligated to receive them and continue the insurance. The insurance, however, was only continued on condition that premium was paid each successive year in advance. Otherwise the contract terminated, except that after three annual payments certain additional rights accrued to the insured, which need not be considered, as but one premium was paid.

By operation of law upon failure to pay the premium in advance, the contract of insurance terminates —that being the condition of the insurance. By the express stipulation of the parties also the same consequence was to follow non payment of premium. Such must be the consequences, whether the policy of insurance was a New York or Washington contract. In no event does the statute of New York interfere with or prevent these consequences. It does not purport to act upon the contract nor the legal effect of any of its stipulations. It deals alone with the insurance company, not at the time of making the contract, but subsequent thereto, and not until after a breach of the contract had occurred through nonpayment of premium. Its only operation is in restraining the insurance company from declaring a forfeiture, or availing itself of a breach of the contract after it has occurred. It places, as we contend, this restraint upon the insurance company, only in case the insured or his assignee has a known postoffice address in the State of New York. Had this contract actually been made in New York, and the insured Hill had a postoffice address in that state, these facts, under the well established rule of the Supreme Court of the United States, would not prevent the lapsing or terminating of the contract by mutual consent, or the conduct, omissions or default of the insured as in any other contract. When the second annual premium became due and the renewal receipt was presented to the insured, *he* then became the actor to continue or destroy this policy regardless of the New York statute when some one else paid on account of the children. He assumed this responsibility. He failed and neglected or declined to pay the premium and accept the renewal receipt. In doing so he knew the contract was by his course of conduct terminated unless some one

else paid. The insurance company possessed no coercive power over him to keep it alive. It exhausted its powers of persuasion in vain to have him continue the contract. Upon the failure to pay the premiums it entered the policy upon its books as lapsed and terminated. He never repented his course, or sought a restoration or renewal of the contract during the three following years of his life. In the language of the Supreme Court in the Sears case: "There is nothing in the New York statute (if controlling at all) to prevent the parties from dealing with that as any other contract, and if they chose to abandon it, that action is conclusive". 178 U. S., 347.

It is to be remembered that in this case the insured himself made the application for the insurance; the contract was between him and the company; the premium paid, was paid by him alone; to him was delivered the policy, and in his possession it remained.

Under such state of facts, we think the following conclusions must be accepted:

There was no obligation on the part of Hill to pay premiums longer than he wished, and the beneficiaries had no contract right to require the insured to make payment.

The insurance company by the contract and the statute, if applicable, dealt solely with the insured. If the insured failed or refused to make a payment at the due date, the contract was terminated unless the beneficiaries or some one in their behalf stepped forward and paid.

No one paid on behalf of the children.

It is wholly immaterial who the beneficiary may be whether a third person not wife or children, or wife or children, so far as the question of notice is concerned. We are dealing only with the question of

statutory notice to the insured, who was the statutory agent of the beneficiaries to receive the notice (Schneider *vs.* Co., 123 N. Y., 109). The wife or children, beneficiaries, cannot recover when the premiums have not been paid. It is not a question of the company preventing them from paying or preventing any one in their behalf from paying. The company, under the premium notice statute, owed no obligation to beneficiaries. The obligation, if any, was to Hill alone. If so, it follows that Hill was without excuse for non-performance, and his non-performance had its full effect, namely, termination of the policy, no one else coming forward.

This principle is illustrated by the recent cases in Wisconsin (Ellison *vs.* Straw, 116 Wis., 215, 1903, 92 N. W., 1094), where the Court, in speaking of the married woman's statute, "Lastly, the whole scope of the statute shows that the purpose thereof was that a policy of insurance made upon the life of a person for the benefit of a married woman, the policy being kept in force, shall be to all intents and purposes her property, *free from all interferences, save, of course, forfeitures*, under the conditions of the policy." The same principle is stated in the later case of Behling *vs.* N. W. Nat. Life Co., 93 N. W., 800, where the Court says:

"The further point is made that plaintiff had a vested interest in the policy which cannot properly be prejudiced without her consent by any act of her husband. The rule invoked has no application to acts of the assured causing a forfeiture of his policy, according to the stipulations thereof. That was recently suggested in Ellison *v.* Straw (Wis.), 92 N. W., 1094. The question was only passingly referred to, because it did not seem to be one open to serious controversy. *Of course, whatever interest a married woman has as beneficiary under a*

policy of insurance is subject to the provisions of the insurance contract as regards forfeitures."

The sole excuse the children of Hill urge for non-payment of premiums is that statutory notice was not served on Hill, their statutory agent, although he had full actual notice; but this failure to serve a technical statutory notice did not in any way prevent the children from paying or causing the premiums to be paid. In the case of Wheeler *vs.* The Connecticut Mutual Life Insurance Company, 82 N. Y. Appeals, 543, the policies had been assigned by Vose to his children, for whom he was general guardian. Vose became insane. This was held not to relieve the children.

"Although Vose was their guardian, if incapacitated
'by his insanity, a competent person could have been
"appointed in his place; and hence his insanity was
"not necessarily an insuperable obstacle to their per-
"formance of the condition of the policy, and they
"were not relieved thereby" (p. 550).

The insured stands as principal so far as he is the only person with whom the insurance company had to deal under the statute, if it applied; but if it should be contended that the beneficiaries are the principals and the insured their agent in matters relating to premiums, then the insured's relation to the matter of the statutory notice is that of a general agent clothed with full power; and whether the beneficiary is a person of capacity or laboring under incapacity, in claiming the benefits of the policy he must be bound by the actual notice to his general agent and the latter's failure to pay the premium. If the insured, as general agent, was guilty of such conduct in failure to pay as would preclude him from recovering on the expiration of a term policy payable to himself, his beneficiary, whether over or under age, cannot recover upon like policy, for such representations

and conduct will bind him also, and this, we think, in the nature of things, must be the universal rule, regardless of the capacity or incapacity of the principal. If a guardian or other person represents the infant beneficiary in asserting a claim to the insurance under such circumstances, he steps in the shoes of the insured.

If the beneficiaries maintain that the Company is endeavoring to obtain the benefit of admissions or declarations of the insured against them, then it may be said that it is a rule of evidence that admissions are not admissible unless made by a party to the litigation or by someone identified in interest with a party. The plaintiffs thus assert that the insured is not identified with them in interest and at the same time take the inconsistent position that the insured is so identified in interest with them that the statute requiring that notice be sent to him enures to their benefit and that the insured cannot receive actual notice and fail to pay the premiums so as to bind them.

In Klein *vs.* Insurance Company, 104 U. S., 88, a policy of insurance was issued upon the life of one Frederick W. Klein, payable to his wife, Clara Klein. One of the conditions of the policy was that if the stipulated premium should not be paid on or before a certain day the policy should case and determine. A semi-annual premium due in March, 1871, was not paid. The wife alleged as a ground of relief that the policy was taken out by Frederick W. Klein without her knowledge ; that she had received no information of its terms or conditions until after his death ; that about February 1 he was taken down by the illness from which he died, and that on account of his condition he was incapable of attending to any matters of business whatever, and for that reason failed to pay the premium when it was due. The bill was dismissed in the lower Court, and on appeal this Court affirmed the decree.

Mr. Justice WOODS, in the opinion (page 92), states:

> "She (the wife) was never incapacitated from making payment. The alleged fact that she had no knowledge of the existence and terms of the policy does not relieve her default. If the fact be true, her ignorance resulted from the neglect of her husband, who, in respect of this contract of insurance, was her agent, in not informing her about the insurance on his life and the term of the policy. The bill is therefor an effort by her to obtain relief in equity against the appellee from the consequences of neglect of her own agent."

Knickerbocker Life Insurance Co. *vs.* Pendleton and others, 112 U. S., 696, was a case where a policy of insurance was issued on the life of one Samuel H. Pendleton for the benefit of the plaintiffs as the children of the said Samuel H. Pendleton. The policy was conditioned to be void if the annual premium, or any obligation given in payment thereof, should not be paid at maturity. The annual premium due in July, 1871, was paid by a foreign bill drawn by the insured, with the condition that the policy should be void if the draft was not paid at maturity. The bill was presented and not accepted, on account of want of funds in the hands of the drawee.

In the opinion, at page 708, Mr. Justice BRADLEY says:

> "The drawer (Pendleton) who took entire charge of the policy for his children, put its existence on the condition of the payment of the draft at maturity; and it was his business, as agent or guardian of his children, to see that the draft was thus paid, that the requisite funds were in the hands of the drawee, or that they would pay it, whether in funds or not."

In Miles *vs.* Connecticut Life Ins. Co., 147 U. S., 177, the insurance company issued a policy for $5,000 upon the life of John S. Miles for the sole use and benefit of Sarah G. Miles, his wife. It was at the instance of the insured that the policy was issued and he paid with his own money all of the premiums. Before the tenth premium became due the insured advised the company that he could not pay that premium and wished a paid-up policy. The company advised him not to do so, but to have so much of the $5,000 released as would enable him, with the sum allowed for such release, to pay what would be due as a premium on the remainder. This was agreed to, and a receipt was presented by him, signed by his wife, for $82.39, as a consideration for the release of $700 of the $5,000, the $82.39 being applied towards a premium on the $4,300. Thereupon the husband received a policy for $4,300 on his own life for his wife's benefit. Subsequently he took a paid up policy for $1,195 in the same favor, having given what purported to be a receipt signed by the wife. It appears that the wife's name on both receipts was signed by the husband without her assent. In suit on the $5,000 policy brought by the wife the company set up non payment of premium.

The court held that it was a good defense, and that there was nothing to justify the failure to pay the premium.

In Schneider *vs.* U. S. Life Insurance Co., 123 N. Y., 109, above quoted, the court held that a married woman in whose favor a policy of insurance was issued upon the life of her husband could not claim the benefit of the insurance without at the same time assuming all the responsibility of a failure to perform its essential conditions, among them being the payment of premiums.

In the opinion of O'BRIEN, J., at page 114, it is stated:

"The husband had the possession of the policy and in dealing with the defendant in regard to it was treated as plaintiff's agent, and the rule that when one of two innocent parties must sustain a loss from the fraud of a third, such loss shall fall upon the one whose act enabled the fraud to be committed applies to this case."

See also

Manhattan Life Ins. Co. *vs.* Smith, 44 Ohio State, 156.

In Baker *vs.* The Union Mutual Life Ins. Co., 43 N. Y. Appeals, 273, the Court says:

"The case will not be changed if the policy is regarded as having been procured by the plaintiff, and as the result of an agreement made between her and the defendants. The husband of the plaintiff was the actor in the transaction, and represented the plaintiff; and claiming the benefit of his acts and of the policy procured by his agency, she necessarily ratifies and affirms the contract as it was made, with all its terms and conditions. She adopts the acts of the agent and makes them her own. (Elwell *vs.* Chamberlain, 31 N. Y., 611; Bennett *vs.* Judson, 21 *id.*, 238). If the agent exceeds or transgresses his authority, the principal may repudiate his acts altogether, but cannot affirm in part, and repudiate in part, take the benefit of the favorable parts of a contract and reject the residue."

In Whitehead *et al. vs.* New York Life Ins. Co., 102 N. Y., 143, a husband procured a policy of life insurance upon his own life for the benefit of his wife, or, in case of her death before his, of their children. Held, that the husband had no authority without the assent of the assured to surrender the policy, such an act not being within the scope of the agency inferable from the taking out of the policy by him; but where such a policy by its terms has become forfeited for failure to pay

premiums, the husband may thereafter, in consideration of a sum paid, surrender it. In such case the forfeiture is not waived by the surrender and the assured could not repudiate the surrender and at the same time assert the revival of the policy under it.

FINCH, J. (p. 150):

> "He (the insured), therefore, in procuring the policies to be made, in paying the premiums, *in receiving and acting upon notices* and in doing whatever was necessary to perfect and continue the rights of the assured, must stand in the attitude of an agent, acting and representing the assured, and as having no interest in the policies, unless, possibly, after the death of all of the assured."

Holmes *vs.* Gilman, 138 N. Y., 369, 381, 382, is to like effect.

There are many circumstances under which the beneficiary is bound by the acts or omissions of the insured, and examples of these are the following:

The beneficiary is bound by insured's breach of condition.

Hopkins *v.* N. W. Life, 94 Fed., 729. (Implied condition that insured will not commit suicide.)

Hopkins *v.* N. W. Life, 99 Fed., 199. (Express condition against suicide.)

Ellison *v.* Straw, 92 N. W., 1097. (Quoted above.)

Behling *v.* N. W. Nat'l, 93 N. W., 803. (Quoted above.)

Seitzinger *v.* Mod. Woodmen, 68 N. W., 478. (Suicide.)

Evans *v.* U. S. Life, 64 N. Y., 304. (Residence.)

Hanna *v.* Conn. Mut., 150 N. Y., 526. (Intemperance.)

Douglas *v.* Knickerbocker, 83 N. Y., 492. (Travel on sea. Tweed.)

Schneider *v.* U. S. Life, 123 N. Y., 109. (Fraudulent surrender of policy and lapse.)

Knapp *v.* Homœopathic Mutual, 117 U. S., 411. (Fraudulent surrender of policy and lapse.)

Hathaway *v.* Trenton Mutual, 11 Cush., 448. (Travel restriction.)

The beneficiary is bound by Insured's failure to pay premiums.

Union Central *v.* Buxer, 62 Ohio, 391.

Britton *v.* Mutual Life, 12 Daly, 164.

Beneficiary is bound by Insured's breach of Promissory Warranty.

Mutual Life *v.* Kelly, 114 Fed., 278. (Suicide.)

Schultz *v.* Mutual Life, 6 Fed., 672. (Intemperance.)

Davey *v.* Ætna Life, 20 Fed., 482. (Intemperance—Verdict for Plaintiff.)

Beneficiary is bound by Insured's waiver of statutory right to extended insurance.

Caffery *v.* Ins. Co., 27 Fed. 25.

Beneficiary is bound by Breach of Affirmative Warranty and by misrepresentation committed by insured (i. e., untrue statements in application).

Burruss *v.* National Life, 96 Va., 543.

Beneficiary is bound by Fraud of Insured.

Summers v. Metropolitan, 90 Mo. Ap., 700.
Phœnix v. Willis, 70 Tex., 12.

To sum up. In the Hill case the children sue because it became payable to them upon their mother dying. No added difficulty arises from the fact that this policy is payable to other persons than the insured as beneficiaries. It is well settled that in all matters connected with the making of the application and the taking out of a policy the insured acts as the agent of the beneficiary, who is bound by the statements and the conduct of the insured. Similarly, for all matters connected with the payment of the premium and the receipt of any statutory notice with respect thereto, the insured must be considered the general agent of the beneficiary. The insured as applicant is the person who determines how and when the premium is payable and who is expected to pay the premium and who generally actually does pay the premium. That is the theory on which the statutory notice is based. The scheme of the contract makes no provision for payment of the premium by anybody but the insured. But statutory notice must be sent to the *assignee* if the policy is assigned. That is, the insured represents everybody, unless the policy is *assigned*. This is conconclusive upon the question here before us. The statutes with regard to the sending of premium notices relate primarily to the sending of notices to the insured—not to the beneficiary. It has been held that the insured is under no duty to the beneficiary to pay the premiums and keep them up. Remembering that the statute contains no provision for sending notice to the beneficiary and confers no right of forfeiture upon the company if the notice be sent to the

beneficiary, it seems clear that in all matters connected with that notice the insured must be regarded as the representative and agent of the beneficiary as decided by the New York Courts in the Schneider case. The statute is designed not to jog the memory of the beneficiary, not to guard against the negligence or want of business promptness and the attention of the beneficiary, but to deal in these matters simply with the insured. This doctrine is expressly sustained by the Lone case and inferentially by the Phinney case. When the insured, as in these cases, refuses to pay a premium, elects and makes known his election to the company to allow the results of such failure to take place, and subsequently for many years does not pay any premiums, the company is lulled into security and the belief that the insured has abandoned the policy.

4. *Even if the statute otherwise would control, still the statutory notice was waived not only by special agreement in the policy, but also by Hill, the statutory agent to receive the notice, in that he received actual notice and did not insist upon the technical statutory notice.*

We have heretofore shown that the claim, that the laws of New York governed by convention of the parties by reason of the special clause as to where the contract was made, must involve a concession on the part of Hill's counsel that the parties had the right by the same convention to exclude the operation of the premium notice law. In view, however, of the claim made that the premium notice law notwithstanding this agreement applies, and that Hill himself could not receive actual notice and waive the statutory notice, it is necessary for us, at the risk of unduly lengthening this brief, to remind the Court that in the previous cases it has decided that the parties in-

terested could waive. This appears from the following statements:

In the Phinney case this Court stated that it assumed, without deciding, that the law of New York did control in respect to that contract. The Court then went on to hold that Phinney's executrix could not recover, which necessarily involved the waiver.

And in the Sears case this Court says: "As we held in the prior case, there is nothing in the New York statute (if controlling at all), to prevent the parties from dealing with that as any other contract, and if they choose to abandon it that action is conclusive."

Notwithstanding these statements by this Court the matter is brought up again by opposing counsel so that it is incumbent upon us to bring before the Court the argument on the subject of waiver heretofore presented to this Court with such modifications as subsequent decisions have made.

This notice statute was one which could be waived not only when this contract was entered into, but by Hill the statutory recipient of the notice.

From a practical point of view, there is no objection to this contract of waiver. The Court can almost take judicial notice of the fact that in modern times it is the practice of companies not only to give preliminary notice, but second notices, and oftentimes default notices. The modern struggle is to keep contracts alive. The premium notice statute is a relic of the dark ages of insurance. The paid-up statute of New York which gives the *quid pro quo* where a policy holder defaults has been copied elsewhere, but the notice statute *never*, as applying to old line companies. One has only to examine the premium notice cases which have been decided in some State Courts, to see how it has been

used as an oppression to honest persistent policy holders.

It has been shown above that the fact of the agreement of waiver having been made in the policy indicated that the New York law could not govern, if opposing counsel claim, that under New York law the statute could not be waived.

No Circuit Court of the United States has ever decided that this statute cannot be waived except the Circuit Court of Appeals, in a different case, from which this appeal is taken. In the case of Equitable Life *vs.* Nixon, 81 Fed. Rep., 736, the same Court, per Ross, C. J. (where the question arose not on a contract of waiver in the policy, as in this case, but upon facts discussed below), said: "The statute is mandatory and controls the contract." Quoting cases discussed hereafter. The above is simply a dogmatic statement of the law. "The statute is mandatory", the Court says, but the statement is supported by no reasoning. Besides in the Nixon case the contract was confessedly a New York contract having been issued upon what is known as a "binding receipt" making the contract take effect in New York.

Hill accepted as the contract by which the rights of the beneficiary were to be determined a policy which, by its unmistakable language, dispensed with the necessity of the insurer giving any notice required by any statute. It was entirely competent for the applicant, as we have shown above, to make a contract by which rights, conferred upon him as the statutory agent of his wife and children, by this statute could be waived, if it otherwise would apply. See cases cited a few pages prior to this on beneficiary being bound by the contract as made.

This statute was passed solely for the benefit and protection of the individual in his private capacity, and

could be dispensed with without infringing on any public right or public policy. The public policy of the State would be in no way contravened by its waiver. The person entitled to notice could, therefore, by contract waive the benefit and protection of its provisions.

Caffery vs Ins. Co., 27 Fed., 25.
Desmazes vs. Ins. Co., 7 Ins. Law J., 926; s. c., 7 Fed. C., 529; case No. 3821.
Ins. Co. vs. Curry, 13 Bush., 312.

The Caffery case above cited is worthy of more than passing consideration. The decision was rendered by Mr. Justice Brown, now of this Court. The principles decided are applicable to the case now before the Court, and so far as counsel are able to discover, have never been contravened, except by the single California case of Griffith, the reasoning of which is opposed to the uniform current of authority.

The statute of Massachusetts passed in 1861, provided, that no policy of insurance hereafter issued by any company chartered by the authority of the Commonwealth shall become void or be forfeited by the nonpayment of the premium thereon, etc., "*anything in the policy to the contrary notwithstanding.*" (This clause is also in the Missouri statute construed in the Wall case, and in the Iowa statute construed in Mutual Benefit *vs.* Robinson, 54 Fed. Rep., 580).

The John Hancock Mutual Life Insurance Company, chatered by the Commonwealth of Massachusetts, issued a policy containing, *inter alia* this provision: "It is hereby agreed that every person accepting or acquiring any interest in said policy waives the benefit of Chapter 186 of the Laws of 1861 of the Commonwealth of Massachusetts."

Suit having been brought upon this policy, the plaintiff insisted that the provisions of the statute could not be waived. Judge BROWN, in discussing this contention,

at page 28, says: "We think, however, that a party may waive the benefit of the statute, The words 'anything to the contrary notwithstanding' in our opinion were intended to apply to the ordinary form of policies which provides that there shall be a forfeiture if the premium be not promptly paid; but if the parties choose to adopt any other form of policy which shall be non-forfeitable, we think it within their power to agree that this form shall be substituted for the statutory form, and that the statute may thus be waived by the express agreement of the parties."

The Desmazes case has never been overruled. In the case of Holmes *vs.* Charter Oak, 131 Mass., 64, the point as to waiver was not alluded to in any way.

The Desmazes case above cited was based upon the same statute of Massachusetts and Justice CLIFFORD of the Supreme Court, sitting at Circuit, rendered the decision, holding that the statute *being made for the benefit of the insured*, could be waived by him, not only expressly *but impliedly, by assuming a position inconsistent with an intention to claim its benefit*, which is what Hill did, saying: "Contracts in general will not "usually have the effect to modify the statute, but to "this rule there is a large class of exceptions

"Cases often arise where a party is at liberty to "waive statutory provisions in his favor, and Mr. Sedg- "wick lays it down as a general rule, that where no "principle of public policy is violated, parties may "waive the provisions of a statute which, if fulfilled, "would operate in their favor, and that proposition is "fully sustained by many other authorites. * * * "When the parties undertake in the policy itself to "declare the meaning and effect to be given to its stip- "ulations, they have a right to do so, except in cases "where there is some provisions in the statute to in-

"dicate an intention on the part of the legislature to "control the action of the parties in that respect."

In the case of Insurance Co. *vs.* Curry, above cited, the statute provided that all statements in applications for policies should be deemed representations and not warranties, and that misrepresentations should not where not material or fraudulent, prevent recovery. The Court held that parties could contract contrary to the statute. "No principle of public policy is involved in a case like this, and when a party chooses by his or her contract to stipulate that parts of it shall have a construction and effect different from that the law would give to it but for their contrary declaration in the contract itself, it ought to be interpreted by the Courts as they have contracted it shall be interpreted."

Where the legislature intends that a provision as to notice shall not be waived by the parties, an express enactment to this effect is usual, *but there is no such enactment in the New York premium notice statute.* Thus in Iowa, by Chapter 210 of the Laws of 1880, it is provided that fire insurance companies shall not declare policies forfeited or suspended for non-payment of notes, unless a thirty-day notice is given, "anything in the policy or application to the contrary notwithstanding."

It is a rule of universal application that statutes made for the benefit of a particular individual, or for a particular class of individuals, and which do not concern the public as a whole, may be waived by the individuals for whose benefit they were enacted.

Mr. Endlich, "Endlich's Interpretation of Statutes," Sec. 444, says: "Another maxim which sanctions the non-observance of a statutory provision, is that *cuilibet licet renuntiare juri pro se introducto.* Everyone has the right to waive and to agree to waive, the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity and which

may be dispensed with without infringing on any public right or public policy."

In the case of Warner *v.* Association, 100 Mich., 160, the Court discussed a statute relating to *assessment* companies, as follows:

"Fixed premiums, payable bi-monthly or otherwise, "are incidents of regular life policies. Assessments are "essential incidents of co-operative associations organ- "ized under this statute, *and notice through some med- "ium is requisite.* The statute relating to assessment "companies does not undertake to fix the time for a "notice, but it does fix and determine what the notice "must contain. The statute contemplates that through "these notices the policyholders shall be advised of the "cause and purpose of the assessments." The statute involved in this Michigan case was, therefore, fundamentally different from the one claimed to be applicable to the case at bar. In the Michigan case the premium was wholly undetermined at the time the contract was made. The premium was "for such an amount as the associa- "tion may deem requisite for the prompt payment of all "losses in the department in which this policy is issued "and for the proper maintenance of the contracts in "said department, including an amount for expenses as "hereinafter provided" The fundamental principle of the contract requires that the policyholder should only pay a certain determinable amount but uncertain till he received his notice, and it was contrary to said principle to require him to pay an *arbitrary* amount as he would be if he was not notified of the cause, etc.

In the subsequent case of Hermany *vs.* Life Association, 151 Pa. St., 23 (1892), the Court said that the Pennsylvania Act of 1885 in relation to warranties of immaterial facts effected a change in life insurance contracts, and that "the evident purposes of this legislation was to strike

"down in this class of cases, literal warranties so far as "they may be resorted to for the disreputable purposes "of enforcing actually immaterial matters. It pro- "vides a rule of construction for the purpose of pre- "venting injustice; and it is as much the duty of "Courts to enforce such rules as it is to administer the "statute of frauds and perjuries." The waiver was held contrary to public policy of Penn. To this class of statutes belongs that in Ins. Co. *vs.* Pollard, 26 S. E., 421. The same principles do not apply to the statute at bar. There is no such element in the premium notice law. Whatever the rule might be if he had no notice, yet if he had actual notice as Hill had the statutory notice is immaterial.

This Pennsylvania statute belongs in this respect to the same class of statutes as the surrender value statutes which obtain in several States as in Missouri, and which provide in substance that after a certain number of premiums have been paid, the policyholder is entitled to temporary or paid-up insurance, provided he surrenders his policy and demands the benefit of the statute within six months; but this insurance statute says "anything in the policy to "the contrary notwithstanding", and that is an implied prohibition against waiver. In the Clement case it was a surrender value statute which was under consideration. All this is foreign to the New York notice statute. *New York has its surrender value statute, which protects against the injustice referred to.*

Yet even the New York surrender value statute expressly allows its provisions to be expressly waived, if waiver is in red ink on the policy, putting that statute on the same footing as we claim the premium notice statute is, namely, non-observance of such a statutory provision, is governed by the maxim, *cuilibet licet renuntiare juri pro se introducto.* Every one has a

right to waive and to agree to waive the advantage of a law or rule made solely for the benefit and protection of the individual, in his private capacity, and which may be dispensed with without infringing on any public right or public policy.

Mr. Sedgwick (Sedgwick's Construction of Statutory and Constitutional Law, 2d Ed., p. 86) says: "The general rule is that a contract or agreement can modify a law. * * * These are cases where a party is held at liberty to waive statutory provisions, which, if insisted on, would inure to his benefit and generally it is true that where no principle of public policy is violated parties are at liberty to forego the protection of the law. * * * It has been said in New York, 'a party may always waive a right in his favor created by statute the same as any other.' * * * The general rule holds good as well in regard to constitutions as to statutes. A party may waive a constitutional as well as a statutory provision made for his benefit. * * *"

Mr. Cooley (Cooley's Constitutional Limitations, 6th Ed., p. 214), says: "Where a constitutional provision is designed for the protection solely of the property rights of a citizen, it is competent for him to waive the protection, and to consent to such action as would be invalid if taken against his will."

In Phyfe *vs.* Eimer, 45 N. Y., 102, Judge RAPALLO, delivering the opinion of the Court, says: "One of full age and acting *sui juris* can waive a statutory, or even a constitutional provision in his own favor, affecting simply his property or alienable rights, and not involving considerations of public policy."

See also Buel *vs.* Trustees, 3 N. Y., 197.

So it has been held that the debtor may waive a statute of limitations made for his benefit.

Sanger v Nightingale, 122 U. S., 183.
Webber vs. Williams College, 23 Pickering, 302.
Buswell on Lim and Ad. Poss., Sec. 49.

Also, parties may waive the right declared by statute of assignees of life, fire, &c., insurance policies to sue in their own name.

Insurance Co. vs. Lupold, 101 Penn. St., 111.

An adjacent land owner may waive his rights under an act requiring a railroad company to fence.

Ry. Co. vs. Decker, 2 Watts, 343.

If the policy would have been otherwise controlled by the terms of the New York statute, can it be doubted that the privilege of notice conferred by this statute upon Hill was waived by the express terms of the contract?

The general public could have had no concern in a private contract between Hill and the plaintiff in error. However favorable or unfavorable the terms of that contract might have been, the public welfare was in no way affected thereby. Hill as the statutory agent to receive the notice on behalf of all, had a right to claim the benefit of the protecting provisions of the New York statute, if it be applicable; and he had an equal right to contract for the waiver of the benefit thereof. He did waive them in clear and express terms, showing his intention so to do, and the learned Court below committed reversible error in refusing to so construe the contract as to give effect to the plainly expressed intention of the contracting parties.

In Keller *v.* Home Life Insurance Co., 95 Mo., App. 637, the Court in speaking upon the question, whether the statute prohibiting physicians from testifying as to information obtained in their professional capacity could be waived, said:

"The question is whether such a waiver may be made in advance, as in this instance, so as to be binding on a beneficiary of the contract other than the party making the waiver.

"The general rule is, that a party may waive for himself, at least, a right or privilege conferred by law for his benefit where such waiver does not conflict with any principle of public policy. Thus one may waive in advance the benefit of the lien conferred by the statutes concerning mechanics' liens. (Sanders Brick Co. *v.* Barr, 76 Mo., App. (St. L.), 380). An indorser, likewise, at the time of his endorsement may in writing waive presentment and notice of dishonor of the paper to which he became a party. (Maddox *v.* Duncan, 143 Mo., 612; Wilkie *v.* Chandon, 1 Wash., 355; Story, Bills, Sec. 320). * * *

"If the patient himself may make such a waiver in advance, as seems in accord with principle, we do not see why he may not make such a waiver an element of his contract of insurance, and having done so the waiver will be binding on all who come within its terms. Here the waiver is expressly designed and expressed to include "any person who shall have, or claim any interest in any policy issued hereunder'. A beneficiary in a policy is bound by the other valid and legal stipulations entered into by the insured, and is even liable to be defeated by fraud on the part of the latter in which the beneficiary had no part. Carpenter *v.* Ins. Co., 1 Story, 57; Burrus *v.* Life Ass'n, 96 Va., 543. If the waiver is a valid part of the stipulations of a policy, as we construe it to be, we consider it binding on all persons who claim under the policy."

The question of waiver of the provisions of this statute have never been adjudged by any decisions except in the Nixon case, above referred to, and the case of Griffith *vs.* New York Life Ins. Co. (101 Cal., 627),

cited in the Nixon case, wherein the decision was adverse to the contention of plaintiff in error. This Court, however, is unhampered by any binding adjudication, and indeed as we claim the right to waive is implied in the cases already decided, and we submit for its consideration that the Griffith case is outweighed by the authorities heretofore cited, both in the reasoning by which the conclusions are reached and in the authority of the Courts rendering the same. The same may be said of the case of Warner *vs.* National Life, 100 Mich., 157, construing a different statute. This Court can hardly err in adopting as its own the conclusions reached by such jurists as Justices Brown and Clifford.

Both the Caffery and Desmazes cases are cited by the California Court with apparent approval, but that Court attempts to distinguish between the language of the New York and Massachusetts statutes. It is difficult to conceive any distinction in meaning between the language used in the New York statute, "No life insurance company * * * shall have power to declare forfeited or lapsed any policy," etc., and that used by the Massachusetts statute, "No policy of life insurance * * * shall be forfeited or become void," etc. (Revised Statutes, Mass., 1892, p. 717, sec. 159). It is, to say the least, hypercritical to draw a distinction between a statute which declares that a company shall not do a certain thing, and one that declares it shall not have power to do that thing. Can it be doubted that both Legislatures had in view the same purpose? It is also noticeable that both statutes use the expression, "anything in the policy to the contrary notwithstanding," which, under the authority of the cases relied upon by plaintiff in error, means nothing more than this, that a forfeiture shall not be had, even though contracted for by the express terms of the policy, and does not in any

way refer to mere question of notice and does not inhibit the parties from contracting to waive the statute as to notice.

It will be noted that the facts upon which the Supreme Court decided the case of Ins. Co. *vs.* Clements, *supra* (cited in the Nixon case), that the provisions of the statute of Missouri could not be waived, are entirely lacking from this case. In that case the Circuit Court of the United States sitting in the Western District of Missouri, held that by reason of the public policy of the State of Missouri, a waiver of the statute of that State relating to the forfeiture of life insurance policies, could not be made, even by the express agreement of the parties. This case was one in which the Federal jurisdiction depended upon the diverse citizenship of the parties. The Federal Court in such a case adjudicates the rights of the parties, precisely as should a tribunal of the State in which it is sitting.

Pritchard *vs.* Norton, 106 U. S., 124 (129).

The public policy of the State of Missouri, was, therefore, binding upon the Federal Court, which decided the Clements case. No public policy against waiver has ever been declared by the highest Court of New York. The case of Strauss analyzed by us just below is not contrary.

A strict limit is drawn by the Constitution of the State of New York over the power of the Legislature to interfere with the right which a man has to make any contract he chooses which is not forbidden by law. The liberty which is guaranteed by the Constitution is not merely freedom from physical restraint, it is freedom from interference with his right to pursue any honest calling and to make any honest contract. *In re* Jacobs, 98 N. Y., 107 ; People *vs.* Marx, 99 N. Y., 377. In the absence, then, of fraud, duress or imposition, every man

in the State of New York, and also in the State of Washington, is free to agree to waive rights. It is his privilege to grant away that right which the Legislature has given him or which the Constitution guarantees him. He may, for instance, waive the right of trial by jury. If it be true that he can waive such a grave constitutional right as that, which is the expression of the ultimate policy of the law, not only of the State, but of the nation, can it be said that he has not the right to waive the service of a notice of the time and place of the payment of an indebtebtness? An endorser on a bill of exchange may waive the legal incidents of protest and notice of non-payment, and yet leave all the other incidents of the bill unaffected and its obligation of payment undisturbed; and he may make this stipulation on the bill itself when he endorses it. So the maker of a promissory note may, in the very contract itself, waive demand for payment. There is nothing better established in the law than that the endorser of a bill or note is liable to pay it, if it is not paid by the party primarily liable; and yet the liability may be waived by the acceptance of such an instrument with the words, "without recourse" written over the endorsement. So the benefit of exemption and stay laws may be waived.

Daniel on Negotiable Instruments, Sec. 61.

This rule of the right to contract is universal, excepting only where it is the policy of the law that certain liabilities to the public at large by one who is engaged in a public business shall not be waived by contract. Thus a common carrier or an innkeeper shall not contract against the liability for his own negligence; and yet even this doctrine is yielding to modern influence.

Sir George Jessel says in Printing Co. *vs.* Sampson, 19

Eq. Cas. L. R., 462.: "There is one thing, which more than anyother public policy requires, and that is that men of full age and competent understanding shall have the utmost liberty of contracting, and that contracts when entered into freely and voluntarily shall be held good and shall be enforced by courts of justice."

If the parties had the power to contract that the laws of New York should govern this contract, they certainly had the power to declare at the same time how far said contract should be subject to said laws, and to waive any particular law of New York, or any portion of any statute of that State.

None of the decided cases holding that this statute cannot be expressly waived are either well considered or binding upon this Court.

There is nothing in the case of Strauss *vs.* Union Central Life Ins. Co., 170 N. Y., 349, contrary to what is claimed by us in this case. In the Strauss case the company was an Ohio corporation, the policy was applied for, issued and delivered in New York, and the residence and Post Office address of both Levy, the insured, and Strauss, the assignee, were in New York. The contract was, therefore, dominated by the statute, not by the convention of the parties, but by the fact that it came within the territorial operation of the statute.

The opinion of the Court below was affirmed by a divided Court, three Judges dissenting from the opinion.

The situation is entirely different from the Hill case, where the statute, if applicable at all, *depends entirely upon the agreement of the parties*. and, being so dependent, is subject to waiver of notice by Hill or an equivalent actual notice.

The Strauss case is also clearly distinguishable from the case at bar in the following respects:

The facts of the Strauss case made a strong appeal to the Court's sense of justice. The policy required the payment of *only* ten annual premiums in all. Six of these had been paid and a part of the seventh was actually paid on or before the date it was due. The Insurance Company in the Strauss case sought to exercise an *absolute forfeiture*, the policy not providing for any paid-up or extended insurance in case of non-payment of a premium note. In the case at bar, only one premium was ever paid and under the universally recognized principles of the science of life insurance, there was no reserve belonging to the policy which the insured or beneficiary could claim.

In the Strauss case the Company sought to confiscate a very valuable contract. In the case at bar the beneficiaries are demanding something for nothing.

In the Strauss case there was no express waiver of the statutory notice and the court merely declined to find that the insured had waived such notice by *implication*.

In the Strauss case the plaintiff was an assignee who had given value for the policy. In the case at bar the beneficiaries never gave anything of value to the company. The beneficiary must bear the legal consequence of the statutory agency, *i. e.*, acceptance of actual notice as a substitute for statutory notice and waiver of the statutory notice.

In the Nixon case, 81 F. R., 802, *there was no contract of waiver in the policy*. The waiver relied on was one after the premium became due. The Court said "The statute is mandatory and controls the contract." and refers to the *Clements* case, the *Hicks* case, the *Griffith* case, and the *Warner* case. This statement of the law is simply dogmatic. No reason of any kind is assigned. The statute is simply declared mandatory. The

Trimble case (83 F. R., 85) in the same circuit simply followed the Nixon case.

The Clements case was not upon this statute.

The Rosenplaenter case (96 F. R., 721), had no question in it of waiver of any statute or stipulation to waive a statute.

In the Hicks case (60 F. R., 690) also there was *no agreement of waiver in the* policy, and no claim that *sending of notice* had been waived. The claim by the plaintiff was that there had been such a course of dealing that the assured was authorized to suppose that payment of the premiums within a reasonable time after the day of payment would be satisfactory to the defendant. The case is no authority that the statute cannot be expressly waived.

In the Griffith case (101 Cal., 627) there was an express agreement to waive. The Court held that the notice was a matter of public policy, because of the phrase in the statute "No * company * * shall have power." The statute does not say that the notice shall not be waived. Suppose the statute had read "No * * company * * shall have power, etc., * * unless sending notice expressly waived." There would have been nothing inconsistent in this. The Court obviously lays an undue stress on the word "power," which has no special significance, and as has been shown elsewhere, has been eliminated from later statutes. The Court adds: "The rea- "sons for such a policy are so numerous and obvious, "that it is not deemed necessary to occupy time. "and space in specifying them." No Court has ever stated any "numerous and obvious reasons," for there have been none. The propriety of a waiver is abundantly shown elsewhere in this point.

In the case of Ins. Co. *vs.* Smith, 41 S. W., 680, there was no *discussion* of the question of waiver.

The Warner case, 100 Michigan, 157, was not a case construing the New York statute in question, but another statute in the State of New York relating to Assessment Companies. The policy provided that notice should be sent that the premium was payable and that any other notice was expressly waived. It further provides that in the event of the holder not receiving a notice he should pay an amount equal to the last premium paid.

The statute requires that each notice shall truly state *the cause and purpose of the assessment.* The Court held that these statutory provisions could not be waived by the parties and that the statute contemplates that through the notice the policyholder should be advised *of the cause and purpose of the assessment.* The statute could not be voided by a condition annexed to the policy, but in case no notice was given the insured should forward to the association an amount equal to the previous assessment, spoken of in the statute as "the scope," but this statute is entirely different from the one at bar.

The following cases are cited to show the great variety of instances in which the doctrine of waiver is applied in both State and Federal Courts, all bearing directly upon the present case.

Wright vs. United States (1883), 108 U. S., 281.

Section 3264 of the Revised Statutes provides for a survey of the distillery by the collector, and a written report thereof in triplicate, "of which one copy shall be delivered to the distiller, one copy shall be retained by the collector, and one copy shall be transmitted to the commissioner of internal revenue, and the survey shall take effect upon the delivery of such copy to the distiller."

Said the Court (WAITE, C. J.): In holding that the distillers had waived notice by endorsing on the report

of the survey and signing "We hereby accept the within survey and consider the same as binding upon us on and after this date," with date attached, "the Court below decided that this endorsement was in law a waiver of a delivery of a copy of the report to the distillers, and that the tax was consequently collectible. To this we agree. The language of the act is that 'the survey shall take effect upon the delivery of said copy to the distiller.' This is equivalent to saying that the survey shall be binding on the distiller when the copy is delivered to him. When, therefore, the distiller, in this case, accepted the survey and stipulated that it was binding on him, he, in effect, said that he would consider the survey as having effect without the formal delivery of a copy. *This he might do.*"

In Shutte vs. Thompson (1872), 15 Wall., 151, this Court held that:

Although the formalities prescribed by the thirtieth section of the Act of Congress of September 2d, 1879, authorizing the taking of depositions *de bene esse* in certain cases and stating the circumstances under which and the words in which they may be taken, must be strictly observed (the act itself being in derogation of the common law), yet a party may waive any provisions intended for his benefit. Said the Court: "A party may waive any provision, *either of a contract or of a statute intended for his benefit.*"

In Ins. Co. vs. Norton (1877), 96 U. S., at page 240, this Court says:

"*A party always has the option to waive a condition or stipulation made in his own favor.*" Rule applied in holding that an insurance company had, by accepting premiums after they fell due, waived its right to insist upon a forfeiture for non-payment of premiums which were tendered when insured was *in extremis*.

In Henderson's Distilled Spirits (1871) 14 Wall., 44, Mr. Justice Clifford said: "Being a seizure on land, the claimant is entitled to a trial by jury, but he appeared and the parties entered into a stipulation waiving a jury and submitted the case to the Court upon an agreed statement of facts *as they had a right to do, even before any legislative provision was enacted for waiving a jury by a written stipulation.*"

This Court in the following cases has held that statutory and constitutional privileges may be waived by the persons for whose benefit such provisions are enacted:

Beers *v.* Arkansas, 20 Howard, 529.
(Constitutional privilege of State not to be sued by individual may be waived.)

Bomberger *v.* Terry, 103 U. S., 40.

Rogers *v.* U. S., 141 U. S., 554.
(Jury may be waived.)

Kaukauna Water Co. *v.* Green Bay, etc., 142 U. S., 280.
(Statutory right to compensation for land taken by eminent domain may be waived.)

Sanger *v.* Nightingale, 122 U. S., 183.

Allen *v.* Smith, 129 U. S., 465.
(Statute of limitations may be waived.)

Ins. Co. *v.* Morse, 20 Wall., 451.
(Right of removal to Federal Court may be waived.)

Wight *v.* Davidson, 181 U. S., 377.
(Constitutional right of protection against unjust taxation may be waived.)

Howard *v.* Stilwell, 139 U. S., 199.
(Right to object to interrogatories may be waived.)

See also

Reynolds *v.* Douglass, 12 Pet., 505.
(Guarantor waives notice by acknowledging debt.)

Murphy *v.* Sewing Machine Co., 112 U S., 692.
(Surety may waive right to notice.)

In Tasker *vs.* The Kenton Ins. Co., 58 N H, 469 (1878).

The policy contained following clause:

> **"It is furthermore hereby expressly provided and mutually agreed that no suit or action against the company for the recovery of any claim by virtue of this policy, shall be sustainable in any Court of law or chancery unless such suit or action shall be commenced within twelve months next after the loss shall occur.**
>
> **The action was not commenced within the twelve months succeeding the loss. The clause, said the Court, "is in form and effect a condition precedent and unless it is complied with, there can be no recovery at common law. It is said that the action may be maintained under the provisions of Gen. St. C., 157, S S., 6, 7. * * * But the parties to the policy did not intend that the statute should govern or control it, as they have expressly agreed that the clause in the policy shall be operative, any statute of limitation to the contrary notwithstanding. *Statutes that are made for the benefit of particular persons may be waived by them.* Sections 6 and 7 were evidently enacted for the benefit of those insured, but the plaintiff has waived their benefits in terms as absolute as language can express."**

In Ellis *vs.* Mass. L. Ins. Co. 113 Calif., 612, a life policy provided that no claim should exist under it unless notice and proof of death were given within two years from death of insured. A statute fixed a shorter period, namely, ninety days within which such notice should be given. In holding that the policy provision was a waiver of the statutory benefit, the Court said:

> **"This requirement in reference to the time of notice and proof of death is imperative and binding upon the insured and his beneficiaries But this is a provision incorporated in the law for the benefit of the insurer. A provision in a law or in a contract intended for the benefit of a party may be waived by the party to be benefited thereby."**

In the case of Eimerman *v.* Nathan, 116 Wisc., 124 (1902), the Court, in holding that a landlord had *waived* the giving of the *statutory notice*, required of a tenant upon vacating premises held from year to year, uses the following language: "In speaking of notice to terminate such tenancy, a standard text writer says that such notice, like almost every other species of notice required by law for the preservation of a right, or the exaction of a duty, may be waived. * * * It may be waived by either party before it is due, or after failure to give notice, by acting in conformity to the wishes of the

other party, in amicably terminating the tenancy precisely as though notice had been given. It may also be substantially waived by acting upon a defective notice. And there may be waiver of notice by the party giving it, when he subsequently acts toward the other party precisely as though no such notice had been given.' Wade, Notice (2d Edition), § 641. Upon the facts stated, the Trial Court was justified in finding that the plaintiff *waived* the giving of *written notice as required by the statute*, and accepted a surrender of the premises from the defendant on April 30, 1899."

In the matter of N. Y., L. & W. Ry. Co., 98 N. Y., 447, in holding that a contract appointing a commissioner to determine the value of property appropriated by the company, and regulating the proceedings, was binding upon the party, said EARL, J., of the New York Court of Appeals :

> " Parties by their stipulations may in many ways make the law for any legal proceedings to which they are parties, which not only binds them, but which the Courts are bound to enforce. They may stipulate away statutory and even constitutional rights. They may stipulate for shorter limitations of time for bringing actions for the breach of contracts than are prescribed by the statutes, such limitations being frequently found in insurance policies. They may stipulate that the decision of the Court shall be final, and thus waive the right to appeal ; and all such stipulations not unreasonable, not against good morals, or sound public policy, have been and will be enforced ; and generally, all stipulations made by parties for the government of their conduct or the control of their rights in the trial of a cause, or the conduct of a litigation, are enforced by the Courts."

In the case before us there was an express waiver of the rights to this notice. The object of the act, therefore, was for the benefit of the assured; and there is no statute of New York or Washington which prevents him from entering into a contract that he dispenses with that notice. He has done so in this case by accepting the policy containing that provision.

As heretofore stated, it is contended by defendant in error that the statute of New York, above quoted, applies to and governs this policy by reason of the express agreement of the parties to that effect.

This contention of defendant in error furnishes additional ground, as shown fully above in Point II, for holding that the position taken herein as to the waiver of the provisions of this paragraph, is correct. If this contract is governed by the statute of New York, because the parties have stipulated that it shall be so governed, and by the same contract the parties have limited the application of said statute, and have agreed that no statutory notice shall be necessary, then, surely, if effect is given to their contract for the purpose of subjecting this policy to the control of the New York statute at all, effect must also be given to this waiver.

No one paid on behalf of the children.

In this Hill case this Court has said:

> "Here, as in the last two cases, is disclosed a distinct agreement upon the part of the insured and the Company to waive and abandon the policy and all rights and obligations on the part of the parties thereto.
>
> But it is said that the insured was not the beneficiary; his wife, and in case of her death, their children, being named as such, and that it was not in his power by non-payment or waiver or abandonment, to relinquish or cancel her or their rights in the policy. It is doubtless an interesting question how far the action of the insured can affect or bind the beneficiaries in a life insurance policy. If the answer in this case contained simply the allegation in respect to the insured's agreement with the company, we should be compelled to enter into an examination of that question; but it is alleged not only that the insured and the company

agreed to abandon the contract, but also that the beneficiary, his wife, and the plaintiffs, their children, "failed, neglected and refused" to pay the premium. So we have a case in which not only did the insured and the company abandon the contract, but also the beneficiaries neglected and refused to do that which was essential to keep the policy in life. The allegation in the answer does not disclose a mere omission, for it is 'neglected and refused,' and, of course, there can be no refusal unless with knowledge of the opportunity or duty. A party cannot be said to refuse to do a thing of which he knows nothing. Refusal implies demand, knowledge or notice. The case, therefore, is one in which beneficiaries refused to continue the policy, while the insured and the company abandoned it."

This holding was upon demurrer. We are now confronted by the actual facts. This question as to the children contains upon examination nothing whatever to support their claims. Above we have shown fully how the failure of Hill to pay concluded the children. No one else having come forward in their behalf. In this subdivision we treat of the omission of the children themselves to pay.

This Court says that the allegation of the Hill answer does not disclose a mere omission. This Court does not, however, go so far as to say that the mere omission is not sufficient to terminate.

We think it is, however clear that so far as the children are concerned their omission is sufficient. It is to be observed that premiums became due in 1887, in 1888, 1889 and 1890, and during all these years the only beneficiaries in this policy omitted to keep it alive. They had a guardian and his omission are theirs. His knowledge and their knowledge are immaterial, under the Vose, Klein, Knickerbocker, Miles and Schneider cases above. Their ignorance might be material if any

statutory notice had to be sent to them. As it was, proof of their ignorance of the existence of the policy was wholly immaterial. Their ignorance does not excuse payment. The premium notice law of New York does not require any notice whatever to be sent to the beneficiaries. They cannot, therefore, complain in this Court that the statutory notice was not sent them. The Company was under no duty or obligation to send them notice. The Company could not undoubtedly refuse to accept a premium from them, but it was not obliged to demand it from them or notify them either under the statute or under the contract. If they desire to keep the policy alive themselves they must come forward or someone must come forward in their behalf and pay the premium, and the only obligation the Company is under in regard to them is doubtless an obligation not to refuse the premiums in case they tender them. So far as they are concerned, therefore, the omission to tender these premiums was effective to lapse the contract entirely irrespective of any question of statutory notice.

This Court says: "There can be no refusal without knowledge of the opportunity or duty. A party cannot be said to refuse to do a thing of which he knows nothing. Refusal implies demand, knowledge of notice."

The pleadings fully justified the Supreme Court of the United States in their views, but the Supreme Court of the United States did not limit the termination of the contract to such "refusal." They said such refusal was sufficient. They did not say that nothing else would be sufficient.

We have shown above that the application was signed by Hill. It is also to be specially noted that it was signed as follows:

"Signature of the person to whom the insurance is payable, Ellen Kellogg Hill, by G. D. Hill." The application also contains the following:

3. A. Name of person to whom insurance is payable at death?	A. Ellen Kellogg Hill.
B. Residence? C. Relationship?	B. Seattle, W. T.; C. Wife.
4. C. If a life policy for the benefit of the wife, shall it be paid to her children, to your children, or to the children of the two, if she be not living at the maturity?	A. To the children of two.

The policy itself states it was payable,

"Unto Ellen Kellogg Hill, wife of George Dana Hill, of Seattle, in the County of King, Washington Territory, for her sole use, if living, in conformity with the statute; and if not living, to such of the children of their bodies as shall be living at the death of the said wife, or to their guardian for their use?

All that has been said above in regard to the presumption of knowledge of the due date of the premium by Hill and of his being bound by the contents of the application and the policy and the waiver therein applied equally to Ellen Kellogg Hill, the wife, who was a direct party through her husband to the application. She was a primary beneficiary. The children were the secondary beneficiaries. The children were not even third parties, so to speak. If the mother was not living the policy was payable "to such of the children of their bodies as shall be living." The children took through their parents, the ex-

press parties to the contract, and as such children. Certainly whatever bound the father and the mother must equally bind the children. They could not have the benefit as minors without bearing the burden as minors. They have no interest whatever in this contract except such as they derive through the application of the father and the mother.

Mr. Warburton's argument upon this point we think unsound. He alludes to the case of the Washington Life *vs.* Haney, 10 Kansas, p. 403, in support of his proposition. In that case the question was, "Can "declaration of a party whose life is insured for the "benefit of another, made long after the application "and the contract, be received in evidence against the "assured to impeach the truthfulness of the applica- "tion?" There is no question in this case of impeaching the truthfulness of the application. The sole question in this case relates to the effect of sending no notice if the statute applies. The Haney case has no application.

The case of the Granger's Life *vs.* Brown, 57 Miss. Reports, 308, also cited by Mr. Warburton, relates also to declarations contradicting the written statements in the application. The Court in the Brown case is concerned only with the application, but in the question before us the insured has certain statutory relations in connection with the payment of premiums if the statute applies.

The case of Pingrey *vs.* National Life, 144 Mass., 381, instead of being in Mr. Warburton's favor is against his views. In the Hill case Hill entered into no obligation to continue to pay the premiums.

The Pingrey case held the insured could not surrender the policy. In the Pingrey case when Pingrey surrendered the policy which was in favor of his mother he received in place thereof a policy payable in favor of

this wife. The legality of selling another person's property and receiving the proceeds himself is one thing, the effect of the mere non-payment of the premiums is entirely different.

In Garner *vs.* Germania Life, 110 N. Y., 267, cited by Mr. Warburton, no question arose such as stated by Mr. Warburton. The question in the Garner case is thus stated by the Court, "what he, that is the insured, undertook to do was to destroy the trust *by substituting a new and different beneficiary.* There is no question of that kind here. In the Garner case the Court said, "he, that is, the insured, might omit or refuse to pay a maturing premium, and so suffer the policy to lapse, but the children were at liberty to pay it, though he should refuse, and if they did the contract would remain valid as at first, and suffer no injury or destruction from his refusal to pay. or to further act as his children's trustee." The Hill children were at liberty to pay, but if they did not they would necessarily suffer injury or destruction from the refusal to pay.

Stokes *vs.* Amerman, 121 New York, 337, quoted by Mr. Warburton, was entirely a New York case. It relates to a policy on the life of a resident of New York whose post office address was in New York, and who was insured in the Equitable Life. It refers to right to paid-up policy after three annual premiums had been paid. Only one premium had been paid in the Hill case, and there was no question of a paid-up policy in the case.

The argument in this point can be summed up as follows:

The contract of insurance in this case being a conditional one, the obligation to pay upon the death of Hill depended upon the performance of the conditions of the contract during his lifetime. These conditions con-

fessedly were not performed, and, therefore, the children of Hill cannot successfully maintain this action, unless their right is saved by the premium notice law of the State of New York if applicable. If, therefore, it be assumed that this law controls the contract of the parties, nevertheless, the beneficiaries are bound by the statutory agent Hill's acts, whatever the scope of his authority as between them, for their rights depend solely upon thestatute. They cannot be broadened by inference or intendment. The statute provided for notice to the insured and to him alone, there being no assignee; whatever is sufficient, therefore, to meet the requirements of the statute is sufficient to conclude the rights of the beneficiaries.

The question is not necessarily one of contractual authority between Hill and his children. They are seeking to recover in this action upon a contract, otherwise void on the sole ground that the insurance company has not complied with the requirements of the statute. The object of this law is aptly expressed in the following language of the Supreme Court of Washington in the case of Lone *vs.* Mutual Insurance Company, *supra:*

"And the Legislature taking into consideration the in firmities of memory, enacted this statute for the purpose of preventing insurance companies from taking what in homely phrase is termed 'snap judgment' on its patrons, thereby depriving them of the benefits of contracts by reason of slight negligence on their part, and when there was no real intention to rescind—a beneficent and just law if enforced in the spirit of its enactment, but oppressive and unjust if construed with narrow and literal exactness."

To claim that the Company took a "snap judgment' upon Hill's children would be absurd.

POINT IV.

It was not the intention of the New York Legislature by the premium notice statute to keep a policy alive, and its provisions unimpaired, notwithstanding successive defaults to pay the premium and the abandonment of the contract.

This would be an inequitable construction of the statute and yet this is the practical effort of the plaintiff's contention.

No Court has ever held contrary to the above and the Supreme Court of Washington in the case of Lone *vs.* The Mutual Life (opinion annexed hereto), has just adopted this view referring in its opinion to the Phinney case, 178 U. S., 327.

The literal construction of this statute as claimed by the plaintiff would produce results too oppressive and unjust to have been contemplated. Such a construction would confiscate the property of the other policyholders. The meaning of the statute is to be ascertained by the co relation of the laws relating to the subject-matter, and by the evident intent of the law-maker It is to be enforced only to that extent. In the State of New York this statute has been substantially construed as above claimed.

In the first case, Carter *vs.* The Brooklyn Life Ins. Co., 110 N. Y., 15, the facts were that the policy in question was subject to an annual payment of $82.80, to be paid on the 25th of October in each year, and it contained the usual clause of forfeiture. The annual premiums were regularly paid from 1870 to 1883; and it will thus appear that there were thirteen years' premiums received by the company, of which,

in accordance with the lucid opinion of this Court in the case of the New York Life Insurance Company *vs.* Statham, quoted by this Court in the Cohen opinion, there was a large accretion of these premiums over and above the amount necessary to carry the risk lying in the hands of the company unabsorbed by the cost of carrying the life for that length of time, and which in ordinary insurance parlance is called the "reserve." The notice was not given, but before the next installment of premium became due a tender of the amount was made and a reinstatement of the policy demanded. Upon the refusal of the company to reinstate the policy an action in equity was brought to compel them to do so; and the Court held that they were compelled to do so, and the Court held rightly under this statute. In this case the premiums were compelled to be paid in New York. The collection of the premiums yearly was being had in the state of New York. But that is the extent to which the statute goes. Before another installment becomes due, the unpaid premium should be tendered as well as the coming due premium, at least, upon the date when the latter was due. A reinstatement of the policy after these tenders does not shock the moral sense, or violate our notions of justice or equity. Before the next premium becomes due restitution may be sought to be made, and an application to the equitable powers of the Court to restore the policy may be made.

In the second case, Phelan *vs.* Northwestern Mutual Life Ins. Co., 113 N. Y., 147, the Court decided that the statute operated upon foreign companies doing business in New York, and which issued the policies in that state, delivered them there and received payment for them there. It appears from the record that Phelan resided in New York *and the premiums were collectible there.* In that case the premium was due on December

30, 1892, and it was not paid; but it was tendered to the company about 2 o'clock on January 15, 1893, just fifteen days after it became due, but was refused. The assured died on the night of that day. It was held that the policy was in force.

It is well to bear in mind here the familiar doctrine that "the opinion of the Court must always be read in connection with the facts upon which it is based."

Doyle vs. *Continental Ins. Co.*, 94 U. S., 538.

Applying this familiar principle to the Phelan case, the decision of the court illustrates the true function of the statute. Here was a case where there was a large accretion of premiums in the hands of the insurance company; here was a default in the payment of the premium, and within a very reasonable time a discovery of the default, and an attempt to place the policy-holder right again with the company, and a tender of the premium with that end in view. Here was an attempt to rectify a mistake which had been made, and it was done within a reasonable time, and payment of the premium due was tendered so as to lay the foundation for the continuation of the contract.

In the third case, Baxter *vs.* The Brooklyn Life Insurance Co., 119 N. Y., 450, the action was brought by an assignee of the policy, who resided in New York and whose premiums were collectible there. The insured died on the 7th of September, 1884, and the premium was due and unpaid on the 24th of August, 1884, a few weeks only. It was held here that the plaintiff could recover, in consequence of the failure to give the notice required by the statute; but the Court was divided upon several questions involved. The Court, however, declared by the Judge writing the majority opinion that

the purpose of the statute was to establish a rule which would preserve to the assured the benefits of the premiums paid, and gave him an opportunity to save them from forfeiture by payment within the specified time. It was held there that it was not necessary to tender the amount of the premium due before the action was brought. The Court consisted of seven Judges, and the decision was by a bare majority, three Judges dissenting—Chief Judge Andrews and Judges Earl and Gray.

Says Judge ANDREWS: "The construction placed on the statute in the prevailing opinion that by its operation the premium does not become due until after notice and the expiration of thirty days, and that meantime an action may be brought and a recovery had on the policy, although the premium has not been tendered, is, I think, untenable. * * * It is a condition precedent to the maintenance of such an action that the plaintiff must before suit brought have paid or tendered the premium unpaid. * * * He is not required to show that it was paid or tendered on the day fixed in the policy, because the statute relieves him from that, but he must aver and prove that the payment was made at some time before the action was commenced, or else no right of action has accrued. This construction fully accomplishes the purpose of the statute, while it relieves it of the anomaly that a contract to pay an insurance on condition of the payment of the premiums may be enforced, although the condition has never been performed."

There is another case. De Freece *vs.* National Life Ins. Co., 136 N. Y. 150, but there is nothing in that case which varies from the general view of the statute taken by the Court on this point in the cases above cited.

It thus appears that there is a settled construction as to the right to be relieved from a forfeiture by the Courts of the State of New York under this statute, provided that prompt and immediate relief is sought. It is not

determined how long a time one may with safety rest after the default is continued before some step should be taken to rehabilitate himself by the policy-holder. It will be seen that a powerful minority of the Court objects to the maintenance of an action where the premium has not been paid or tendered before action brought; and there can, therefore, be said to be no settled rule of construction in New York upon this clause of the policy. In such a case it is manifest that the Courts of the United States, before whom the policy may be brought are themselves to construe the policy in accordance with the principles of law applicable to such construction.

The forfeiture is forbidden by the statute for the non-payment of any premium, unless notice is given in such cases. It does not extend its prohibition beyond the singular number, and the non-payment of a second premium unpaid a year after the first, is not touched upon by the statute. Unless the Court can say from this statute, taken in connection with all the laws relating to life insurance, that it was the intention of the legislature to keep the policy alive and its provisions unimpaired even after successive defaults to pay the premium, the plaintiff cannot recover. Will the law bear this construction? Can the judicial mind contemplate such a violent interference with personal rights as being within the contract, unless it is plainly so expressed in the statute?

(A.)

The intention to preserve the contracts only for a year, is clearly shown by the Amendment of 1897.

The Hill policy was issued in 1886 and the first default was in 1887. Hill died in 1890 and the suit was begun

in 1895, so that no question arises in the Hill case directly as to the operation of the Act of 1897.

The defendant in this case has always claimed that the Act of 1897 applies to all defaults after the passage of that act, but the Hathaway case in which this point is raised in the Circuit Court of Appeals was finally disposed of by that Court in accordance with the decisions of this Court, on the ground that the New York statute was not applicable, so that no decision was made in regard to the Act of 1897. The Act of 1897 is here alluded to, not because it has a direct effect upon the Hill contract, but because it is believed that the Act of 1897 in part expresses the true principles which must govern the construction of the previous Act of 1877.

The Laws of 1897, Chapter 218, which took effect April 8th, 1897, amended the laws of 1892, Chapter 590, Section 92.

The claim which we make under this point is that this Act of 1897 is declaratory of the principle stated in "A" above, and also declaratory of the general doctrine that the statute has no extra-territorial operation, for the statute of 1897 says: "postoffice address in this State," that is, New York, and the previous premium notice statute of 1877 must be read in the light of the Act of 1898.

The last sentence of the act of 1897 must be read in connection with the first part of the act.

The main *reason* for the passage of the act was this:

Under the acts of 1876, 1877 and 1892 insurance companies frequently sent notices irrespective of the question whether they were legally obliged to do so or not, but sometimes they happen to be too informal, or were not sent in time. So that not only were there occasionally *bona fide* cases where New York policy-holders, at least, should have recognition, but there was a class of

cases of where policy-holders had clearly abandoned their contracts, yet after death parties had attempted to get insurance for nothing by rai-ing some technical question as to notice, though years had elapsed without the payment of premiums.

The nature of the insurance contract requires *annual* payments (or semi or quarter-annual for convenience merely), and the Act of 1897 was passed in recognition of this principle, and of the principle stated in "A" above. The Statute of 1897 did away with these attempts to get insurance for nothing, and declared that if the policy-holder had the thirty days' previous notice in which to prepare for the payment and pay, the loss was his at the end of that time.

But suppose the company *did not send the notice* in cases where it was obliged to, or sent an informal notice, or one not in time, the policy-holder in New York was not to keep on for years, perhaps, refusing or neglecting to pay premiums and yet the policy be kept alive, but he must *before* the next premium becomes due pay up, or litigate the question as to whether there had been a forfeiture or not.

If the second premium day came and the first premium was not paid, where *there had been no legal notice* in that State, then the policy would be forfeited.

The bar to suit is in the last sentence and carries out the early part of the statute. The language is:

> "within one year from the day upon which default was made in paying the premium * * * *for which it is claimed that forfeiture ensued.*"

Not that a suit can be brought within one year after a *forfeiture*, for there is no claim.

But the words "forfeited policy" means policy claimed to be forfeited by the company. The policy-

holder has a *year* to demonstrate that no *legal* notice was sent, if the company claims it was.

The claim made here has been already sustained in the Oregon State Court in the case of Hathaway vs. *New York Life (unreported.) In that case only one premium was paid and the last default was in 1892. The suit was begun April 8, 1899, more than one year after the last default. The Court found as a conclusion of law as follows: "That this action was not brought within one year from the date upon which default was made in paying the premium due upon said policy, for the non-payment of which it is claimed that said forfeiture ensued, and is barred for that reason.*

B.

The notice in Statute of 1877 referred to forfeiture of premiums already paid on policies or the reserve thereon and to nothing else.

This is one of these cases where the true construction of a statute does not appear upon the surface. But little idea of the scope or effect of this statute can be obtained from a mere *cursory perusal* thereof. In order to reach its real meaning one has to be familiar with all the other statutes upon the same subject, in force at or pre-existing the time of the passage of the statute in question. To construe a statute properly there should be an appreciation of the exact quality of the evil against which the statute was aimed, its extent and its mischief. If the statute is a penal one, that is, if it forbids the doing of some act which otherwise it would be lawful to do, then it has to be strictly construed. If it is a remedial statute, then it is to be construed so as to bring about the remedy which the statute was intended to procure. But, above all

things, the statute must be construed with just ends in view. It must not be extended beyond the remedy which is intended, and particularly it is not to be extended so as to do an injustice, inconvenience, or absurdity. We are not to suppose that the Legislature, in attempting to remedy a wrong, itself created a greater wrong.

Now, let us look at this statute in the light of this familiar bearing. Contracts of insurance such as the Hill are made for the purpose of securing a principal sum to be paid on the death of the life insured, and, in order to secure this principal sum to be so paid, premiums are paid to the company on fixed days. It is absolutely necessary, in order to conduct the business successfully, that such premiums should be so paid because life insurance takes into account not only the average of human life, but compound interest upon the premiums. The payment of the premiums due is therefore essential to the fulfillment of the contract by the company. The contract is not for a fraction of a year or from one installment period to another; although there is that sort of insurance called "term insurance," which is expressly excluded from its provisions. The contract is in two parts. One is a proposition in writing signed by Hill and his wife and addressed to The Mutual Life Insurance Company of New York. The statements made in that application are offered as an inducement to the company to grant the application for insurance; and the policy, when issued, recites that this application is the consideration for granting the policy. The policy provided that the premiums would be accepted when paid in exchange for the company's receipts; and then the following provision was in the policy: "Notice that each and every payment is due at the date named in the policy, is given and accepted by the delivery and acceptance of this policy, and any further notice re-

quired by any statute is hereby expressly waived." *It has a still further provision that "if this policy shall become void for non-payment of premium all payments previously made shall be forfeited to the company, except as hereinafter provided"* (Rec., p. 78).

Now, here is the forfeiture which the statute refers to. This is the forfeiture which is aimed against, and this is the forfeiture which the statute forbids the companies to enforce. What is it? It is not the right to make a contract with the company, or to contine a contract already in existence. The statute prevents the forfeiture. Of what? Why, of the premiums which have heretofore been paid on the policy, and of nothing more. There is nothing more to forfeit. To give such a construction to this statute, that not only is the forfeiture waived, which in this case amounted to one year's premium, but that an effect shall be given to the policy the same as if the premiums were regularly paid on each succeeding installment day provided in the policy, would be to give it a construction contrary to reason and contrary to justice. It would be a violation of the rights of the insurance company, that is, of the persistent premium-paying members, which is unnecessary in order to accomplish the non-forfeiture of the premiums. The statute was intended to provide that notice should be give of the recurrence of the payments, so that the policy-holder should not by forgetfulness, not pay his premium when due. It cannot be construed to mean that the policy-holder was forever discharged from his obligation to pay the premium because of accidental or other failure to send notice. Whether insured had actual notice or not, there is something to forfeit. There is an accretion in the hands of the company of the surplus paid each year the policy has been in force, which is forfeited unless the premium is paid. *It is to prevent that forfeiture that the statute*

was passed, and in this case one year's premium has been paid. To do equity between the parties, you would have to deduct from that one year's premium the cost of carrying the insurance for one year as if it were a term policy, and then the amount of surplus which remains in the hands of the company, and which by the contract it has power to forfeit but for the statute, would be the amount of the proper recovery in this case if the statute applied, but of course it does not.

This is rendered clear by the decision of this Court in the case of the New York Life Insurance Company *vs.* Statham, 93 U. S., 24. The policy in that case had become by its terms void, and the reserve, or surplus, in the hands of the company had been forfeited to the company in consequence of the war with the Southern States. The Court said it was not proper that the policy should be revived, so that upon the policy-holder's offering the amount of the accrued premiums which had been withheld, together with interest thereon, the policy should be reinstated. Mr. Justice Bradley, on behalf of the Court, exhibits not only his clear knowledge of equitable principles and their application to the ordinary affairs of life, but also his accurate knowledge of life insurance. He says: "But whilst this is true, it must be conceded that promptness of payment is essential in the business of life insurance. All the calculations of the insurance company are based on the hypothesis of prompt payments. They not only calculate on the receipt of the premiums when due, but on compounding interest upon them. It is on this basis that they are enabled to offer assurance at the favorable rates they do. Forfeiture for non-payment is a necessary means of protecting themselves from embarrassment. Unless it were enforceable, the business would be thrown into utter con-

fusion. It is like the forfeiture of shares in mining enterprises, and all other hazardous undertakings. There must be power to cut off unprofitable members, or the success of the whole scheme is endangered. The insured parties are associates in a great scheme. This associated relation exists whether the company be a mutual one or not. Each is interested in the engagements of all, for out of the co-existence of many risks arises the law of average, which underlies the whole business. An essential feature of this scheme is the mathematical calculations referred to, on which the premiums and amounts assured are based. And these calculations, again, are based on the assumption of average mortality and of prompt payments and compound interest thereon. Delinquency cannot be tolerated nor redeemed, except at the option of the company. This has always been the understanding and the practice in this department of business. Some companies, it is true, accord a grace of thirty days, or other fixed period, within which the premium in arrear may be paid, on certain conditions of continued good health, &c. But this is a matter of stipulation, or of discretion, on the part of the particular company. When no stipulation exists, it is the general understanding that time is material, and that the forfeiture is absolute if the premium be not paid. The extraordinary and even desperate efforts sometimes made, when an insured person is *in extremis*, to meet a premium coming due, demonstrates the common view of this matter." The Court in that case: "Non-payment at the day involves forfeiture, if such be the terms of the contract." Then the Court goes on to show what there is in the hands of the company to be forfeited, surplus premiums over the amount which was necessary to carry the expired risks, and which is called in insurance circles the "reserve."

That is all that could have been forfeited under any circumstances by the contract. Now, the statute comes in and says that the company shall not forfeit that unless it gives notice. This is a very different thing from saying that unless it gives notice the contract shall be continued to the end of the life of the party insured, and if at any time hereafter he shall die, the whole amount of the insurance shall be paid over after deducting the back premiums If he lived long enough to make those premiums equal to the amount of the principal sum, the company would never hear of him. If he died within a few years, as Hill died in this case, then the company would hear of him as it has heard in this case, with a claim for the amount insured, without any attempt whatever to pay the premiums, which are confessedly unpaid and in arrears. No legislature could ever have meant such injustice. There must be some limit to the time of rehabilitation. To prevent a forfeiture is not to decree a continuance of the contract all on one side, with no payments on the other. There is no language in the statute which will bear the construction that it was intended to apply to more than one failure to pay premium or to preserve to the policy holder more than his reserve.

This statute is as we have shown elsewhere, highly penal as regards the company. The penalty cannot be exacted more than once while the first overdue premium remains unpaid. The statute, if applicable, was exhausted upon the failure to give the notice in April, 1887, and until the assured paid that premium he could not claim the benefit of the statute for the failure to give notice of the payment due a year after in 1888. This would be construing the statute as if it contained the language "that the company is forbidden to forfeit for each and every premium unpaid for which proper notice had not been given.'

The penalty is inflicted upon the company solely to prevent the forfeiture by inadvertence, mistake or forgetfulness. It was not intended to release the insured from all future liability. There can be no continuous credit given for the premiums on the ground of a continuous failure to give notice.

Fisher vs. N. Y. C. & H. R. R. Co., 46 N. Y., 644.

In this case the Legislature had forbidden railroad companies to charge more than two cents a mile for passengers, and inflicted a penalty of fifty dollars for disobeying the law. A passenger rode again and again upon the railroad and then sued for the accumulation of penalties, but the Court of Appeals held that only one penalty could be recovered, for in the quaint language of Judge Grover, who wrote the opinion, people should not be permitted to keep a "book account" of penalties.

SUMMARY UPON THE LAW AND FACTS OF THE CASE.

1. By payment of premium, and delivery of policy, the contract actually came into being in Washington and under the Cohen case became a Washington contract.

2. The insured, from the date of the application to his death, was a resident of Washington, and had no postoffice address in the State of New York. Therefore, the law of New York is inapplicable to this case, because it relates only to instances where the insured or his assignee has a residence postoffice address within that state and the collection of premiums there.

3. The contract was actually entered into in the State of Washington, and can only be deemed made in New York by the convention of the parties; the fact is that so far as the *application* is concerned, the parties have made that portion of the contract subject to the laws of the State of New York; and it is equally certain that so far as the after-matter of notice of the due date of premiums, they have made their express stipulation of waiver, and thereby eliminated the statute of New York.

4. The contract was admittedly made in the State of Washington. Its enforcement is sought in the courts of the United States. It is not contended that there is anything in the contract which is in the slightest degree prohibited by, or repugnant to, the common law or the statutes of Washington or of the United States. We have shown that being made outside the State, the New York statute did not, *ex proprio vigore*, affect to any extent whatever the rights and liabilities of the parties. Both the insurer and the insured were therefore perfectly free to contract together as they saw fit. They could make the requirements of this statute a part of their contract, or they could leave them out, or they could embody part of the law and omit the residue. The business rested with them alone; it was a matter of no concern whatever to any other person or body politic.

There can be no question that the parties might have agreed that the notice law of New York should be deemed a part of the policy, but otherwise the terms and conditions of the policy should be governed and construed by the laws of Washington, in which case the notice would have been necessary. Nor can there be any question that they might have agreed that the policy should be governed and controlled by all of the laws of the State of New York with the exception

of the notice law, in which case the sending of the notice would have been unnecessary. In either case the contract would have been binding on the parties, it would have measured their respective rights and liabilities, and the plain duty of the courts would have been to enforce it as it was written.

They did agree to leave out the premium notice law.

5. The insured was an experienced business man. Personal demand was a number of times made upon him for the premium of 1887, and proper receipt tendered. He declined in each instance to make payment, and sufferred the renewal receipt to be returned to the home office, and never again offered payment or asked a renewal of his policy. No one offered to pay on behalf of the children. Upon the faith of the failure to pay the policy was entered upon the books of the company as lapsed and terminated, and the contract abandoned. The Supreme Court has ruled the New York Statute imposed no restraint whatever upon the insured, and left the parties in their mutual relations as free as if it had not been enacted. In any other contract, a failure for four successive years to make annual payments upon a contract as a condition of its continuance, would defeat the defaulting party in an action in the nature of specific performance. Under the decision referred to it must therefore defeat this action.

6. The insurance company does not rely upon the statute of New York and a forfeiture under it, but it does rely upon the defense of the insured being the statutory agent to receive the notice, his actual notice, and the failure of anyone to pay. Hill deliberately chose to decline and refuse to pay the premium, and to persist in this course for four years, until his death, and no one else stepped forward. The Supreme Court

has held the New York statute in no manner touched or restrained him.

7. The insurance company is a mutual association. Its members are its premium paying policy-holders. The funds from which their insurance is paid is supplied by the aggregate of promptly paid premiums, and the income therefrom. Existing members remain, and new members join the association, on the faith of this fund belonging, proportionately, to the contract-performing members in payment of original insurance, increase of policy or reduction of premiums. One premium only having been paid on this policy, no claim upon the fund exists in favor of Hill or of anyone claiming under him.

8. The insured Hill was the only person under the New York Statute—if it applies—with whom the insurance company had anything to do. He was the Statutory agent. That statute provides for notice upon the insured and his assignee only. It contemplates no notice to the beneficiaries, either primary or secondary.

Hill waived statutory notice.

9. If Mrs. Hill, instead of plaintiffs below, were claiming this insurance, she would be estopped, because having signed the application of insurance, she brought herself within the contract, so as to know or be bound to know, its terms. If Hill, as we contend, was the principal in the contract—she receiving the gratuity of his bounty, did so, upon the terms in which he made the contract, and with knowledge that his refusal or conduct could terminate this contract as any other he might enter into unless someone else stepped forward for her. That he was at liberty to pay or decline to pay premiums, or to continue or end paying on the contract. If she was the principal Hill was her statutory agent,

and she was bound by her agent's act, and could not claim the benefit of the policy without ratifying and assuming whatever he may have done or declined to do in the way of keeping the policy alive.

10. The plaintiffs below were not parties in any manner to the application for the policy of insurance. They never could come under its benefits except subsequent to its execution and delivery, and until their mother's death, so that they claim under their mother, and whatever would bind her equally binds them.

11. In any event they are the beneficiaries of a gift or gratuity, and can only accept such gift or benefit upon the terms and conditions upon which it was given, and by the act of acceptance must adopt and ratify the contract, just as it was made with the insured. This conclusion makes them bound by the failure to perform the contract by paying the premiums and the abandoning of the contract by everyone on their behalf.

12. It was not intended by the Legislature of New York to keep policies alive after successive defaults in the payment of annual premiums.

13. The notice in the New York statute referred to nothing more than the forfeiture of premiums already paid or the reserve thereon.

POINT V.

It is respectfully urged that the judgment should be reversed.

JULIEN T. DAVIES,
EDWARD LYMAN SHORT,
E. C. HUGHES,
FREDERICK D. MCKENNEY,
Of Counsel for Plaintiff-in-Error.

15617

APPENDIX A.

Opinion of the Supreme Court of the United States in the Hill case, 178 U. S., 347.

Mr. Justice BREWER, after stating the case, delivered the opinion of the Court:

"Here, as in the last two cases, is disclosed a distinct agreement on the part of the insured and the Company to waive and abandon the policy and all rights and obligations on the part of the parties thereto.

But it is said that the insured was not the beneficiary; his wife, and in case of her death, their children, being named as such; and that it was not in his power, by nonpayment or waiver or abandonment, to relinquish or cancel her or their rights in the policy. It is doubtless an interesting question how far the action of the insured can affect or bind the beneficiaries in a life insurance policy. If the answer in this case contained simply the allegation in respect to the insured's agreement with the company. we should be compelled to enter into an examination of that question; but it is alleged, not only that the insured and the company agreed to abandon the contract, but also that the beneficiary, his wife, and the pliantiffs, their children, 'failed, neglected and refused' to pay the premium. So we have a case in which not only did the insured and the company abandon the contract, but also the beneficiaries neglected and refused to do that which was essential to keep the policy in life. The allegation in the answer does not disclose a mere omission, for it is 'neglected and refused', and, of course, there can be no refusal unless with knowledge of the opportunity or duty. A party cannot be said to refuse to do a thing of which he knows nothing. Re-

fusal implies demand, knowledge or notice. The case, therefore, is one in which the beneficiaries refused to continue the policy, while the insured and the company abandoned it.

Under those circumstances we think the case falls within the same rule as the preceding; and the judgments of the Court of Appeals of the Ninth Circuit and of the Circuit Court of the United States of the District of Washington are reversed, and the case remanded to the latter Court, with instructions to overrule the demurrer to defendant's answer."

SUPREME COURT,

STATE OF WASHINGTON.

LARS O. LONE, Administrator of the Estate of Joseph M. Rex, Respondent, v. THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation, Appellant.	No. 4811. Filed Dec. 21, 1903.

Appeal from a judgment rendered in favor of the administrator of the estate of Joseph M. Rex against the Mutual Life Insurance Company of New York, on a policy issued November 8, 1889, upon the life of Joseph M. Rex. Rex paid but one semi-annual premium, which was a condition of the delivery of the policy. He lived for nearly twelve years thereafter, dying on the

1st day of August, 1901, during which time he never paid or offered to pay any premium. The usual allegations in relation to issuing of the policy are made in the complaint, and the further allegation that said insurance policy was to be construed according to the laws of the State of New York. At the time of the issuing of said policy, a statute was in force in said State of New York to the effect, in substance, that no policy should be forfeited for non-payment of any premium unless, at least thirty and not more than sixty days prior to the day when the premium was payable, notice had been mailed to the assured, stating the amount of premium, when due, to whom, and where payable, and that if not paid when due said policy would become forfeited and void; and it is alleged that no such notice was given. The respondent relies upon the case of Griesemer *v.* Mutual Life Ins. Co. of New York, 10 Wash., 202, and the kindred case in 10 Wash., 211, holding that a contract of insurance issued in the State of New York is to be construed with reference to the laws of that state. But whether or not this case falls within the rule and reasoning of the Griesemer cases, *supra*, and whether or not subsequent amendments to the statute in New York could affect contracts entered into under pre-existing laws, are subjects which we deem it necessary to discuss; for, conceding that the contract was to be construed with reference to the New York statute relied upon by the respondent, we do not think the respondent should recover in any event, for it appears that the claim is a stale one When a man neglects for twelve years to make annual or semi-annual payments provided for in an insurance contract, and never in fact makes any deferred payment whatever, in the absence of a showing to the contrary he ought to be held to have rescinded the contract which was made with special reference to such payments, they being in

fact the actual consideration for the performance of the contract on the part of the insurance company. The statute, it is true, provides that no life insurance company shall have power to declare forfeited or lapsed any policy by reason of the non-payment of any annual premium unless notice be given in a specified manner, but a statute must be construed, and its provisions enforced, with reference to its objects; and the legislature, taking into consideration the infirmities of memory, enacted this statute for the purpose of preventing insurance companies from taking what in homely phrase is termed "snap judgment" on its patrons, thereby depriving them of the benefit of contracts by reason of slight negligence on their part, and when there was no real intention to rescind—a beneficent and just law if enforced in the spirit of its enactment, but oppressive and unjust if construed with narrow and literal exactness. This was not a law enacted in the interest of public policy, rights under which could not be waived, but it was made for the benefit of individuals who have power to waive the rights conferred. Statutory rights and even constitutional rights may be so waived.

Cooley's Const. Lim. (6th Ed.), p. 214.

The real question at issue is, was the conduct of Rex such as to warrant the action of the company in declaring the contract rescinded, and proceeding with its business and making its calculations as though the contract were so rescinded. In speaking of a case similar in principle, though somewhat different in facts, the Court, in Smith *v.* New England Mutual Life Ins. Co., 63 Fed., 769, said :

"The assured acquiesced in the company's position —that his policy had lapsed—and accordingly neither paid nor tendered subsequent premiums, but treated the

policy as a security simply for the interest acquired under the statute Had his life been continued the claim now made would never have been urged or thought of; his early death alone suggested it."

We are satisfied that the thought never occurred to Rex during his lifetime that he had a claim against this company on the policy which had been issued so many years before, or, if he did, after the lapse of any appreciable time, it was a dishonest thought, for he knew that he had not performed the duties which devolved upon him under the contract and that he had no rights thereunder; and there seems to be no just reason why his administrator should demand rights which he had virtually waived. In Shutte *v.* Thompson, 15 Wall., 151, where a party was standing upon his statutory right in relation to the notice concerning depositions, the Court said that it was not doubted that all the provisions of the statute respecting notice to the adverse party could be waived by him; that a party could waive any provision either of a contract or of a statute intended for his benefit; and that, if a course of action on his part had misled the other party, he ought not to be allowed to avail himself of his original rights, because under such circumstances he would be availing himself of what was substantially a fraud, and that he should not be allowed to reap any advantage from his own fraud.

This is a mutual life insurance company, and, in the case of Mutual Life Ins. Co. *v.* Phinney, 178 U. S., 327, a case which involves the construction of the statute relied upon here, the Court, without actually deciding the proposition, said:

"Now, whether the insurance company, if the law of New York be applicable, could insist upon a forfeiture without giving the notice prescribed by the statutes of that state, and, enforcing it, forfeit all premiums paid, all obligation for the return of the surrender value, all

right of the insured by subsequent payments to continue the policy in force, is one question. But it is a very different question whether the executrix of the insured, after his long delinquency in the payment of premiums, can enforce the contract as against the other insured parties, thereby diminishing their interest in the accumulated reserve. Ordinarily noone can enforce a contract unless on his part he performs the stipulated promise, and it may be that this rule is operative in this case."

And while the Court declined to decide the question because it was not necessary for the determination of the case, it evidently assumed that the rights of the policy holders in mutual companies were worthy of consideration. So that in this case, this being a mutual life insurance company, the action of Rex, in seemingly abandoning his contract, affects every stockholder in the company, thereby, if he should prevail, diminishing their interests in the accumulated reserve.

From every consideration of justice and fair dealing, we think the respondent should not be allowed to recover in this case. The judgment will therefore be reversed and the cause remanded with instructions to render judgment in favor of the defendant for costs.

DUNBAR, J

We concur:

FULLERTON, J.
HADLEY, J.
MOUNT, J.
ANDERS, J.

C.

NEW YORK PREMIUM NOTICE STATUTES.

L. 1876, Ch. 341 (May 15, 1876).
Amended by
L. 1877, Ch. 321 (May 23, 1877).
Repealed by
L. 1892, Ch. 690, Sec. 295 (took effect Oct. 1,1892).
New statute enacted by
L. 1892, Ch. 690, Sec. 92 (took effect Oct. 1, 1892).
Amended by
L. 1897, Ch. 218 (took effect Apl. 8, 1897).

LAWS OF 1876.

CHAPTER 341.

AN ACT regulating the forfeiture of life insurance policies.

Passed May 15, 1876.

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

SECTION 1. No life insurance company doing business in the State of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed, by reason of non-payment of any annual premium or interest, or any portion thereof, unless a notice in writing, stating the amount of annual premiums or interest due and when due on such policy, and the place where said premium or interest may be paid, shall have been duly addressed and mailed by the company issuing such policy to the insured, postage paid, as his or her last known post office address, not less than thirty nor more than sixty days next before such payment becomes due, according to the terms of such policy.

SEC. 2. The affidavit of any officer, clerk or agent of the company that the notice to the assured, provided for in Section one, has been duly addressed and mailed by the company issuing such policy to the assured, shall be presumptive evidence of such notice having been duly given.

SEC. 3. This act shall take effect immediately.

LAWS OF 1877.

CHAP. 321.

AN ACT to amend chapter three hundred and forty-one of the laws of 1876, entitled "An act regulating the forfeiture of life insurance policies."

Passed May 23, 1877.

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

SECTION 1. Section one of chapter 341 of the laws of eighteen hundred and seventy-six, entitled "An act regulating the forfeiture of life insurance policies, is hereby amended so as to read as follows:

SEC. 1. No life insurance company doing business in the State of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed by reason of non-payment of any annual premium or interest, or any portion thereof, except as hereinafter provided. Whenever any premium or interest due upon any such policy shall remain unpaid when due, a written or printed notice stating the amount of such premium or interest due on such policy, the place where said premium or interest should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to

the person whose life is assured, or the assignee of the policy, if notice of the assignment has been given to the company, at his or her last known post office address, postage paid by the company, or by an agent of such company or person appointed by it to collect such premium. Such notice shall further state that unless the said premium or interest then due shall be paid to the company or to a duly appointed agent or other person authorized to collect such premium within thirty days after the mailing of such notice, the said policy and all payments thereon will become forfeited and void. In case the payment demanded by such notice shall be made within the thirty days limited therefor, the same shall be taken to be in full compliance with the requirements of the policy in respect to the payment of said premium or interest, anything therein contained to the contrary notwithstanding; but on such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice. Provided, however, that a notice stating when the premium will fall due, and that if not paid the policy and all payments thereon will become forfeited and void, served in the manner hereinbefore provided, at least thirty and not more than sixty days prior to the day when the premium is payable, shall have the same effect as the service of the notice hereinbefore provided for.

SEC. 2. The affidavit of anyone authorized by section one to mail such notice, that the same was duly addressed to the person whose life is assured by the policy, or to the assignee of the policy, if notice of the assignment has been given to the company, in pursuance of said section, shall be presumptive evidence of such notice having been given.

SEC. 92. *No forfeiture of policy without notice.* No life insurance corporation doing business in this State shall declare forfeited, or lapsed, any policy hereafter issued or renewed, and not issued upon the payment of monthly or weekly premiums, or unless the same is a term insurance contract for one year or less, nor shall any such policy be forfeited, or lapsed, by reason of non-payment when due of any premium, interest or installment or any portion thereof required by the terms of the policy to be paid, unless a written or printed notice stating the amount of such premium, interest, installment, or portion thereof, due on such policy, the place where it should be paid, andthe person to whom the same is payable, shall be duly addressed and mailed to the person whose life is insured, or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last known post office address, postage paid by the corporation, or by an officer thereof, or person appointed by it to collect such premium, at least fifteen and not more than forty-five days prior to the day wheu the same is payable.

The notice shall also state that unless such premium, interest, installment, or portion thereof, then due, shall be paid to the corporation or to a duly appointed agent or person authorized to collect such premium by or before the day it falls due, the policy and all payments thereon will become forfeited and void except as to the right to surrender value or paid-up policy as in this chapter provided.

If the payment demanded by such notice shall be made within its time limited therefor, it

shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment; and no such policy shall, in any case, be forfeited or declared forfeited or lapsed, until the expiration of thirty days after the mailing of such notice.

The affidavit of any officer, clerk or agent of the corporation, or of anyone authorized to mail such notice, that the notice required by this section, has been duly addressed and mailed by the corporation issuing such policy shall be presumptive evidence that such notice has been duly given.

(The above act in § 295 also repealed the acts of 1876 and 1877.)

LAWS OF 1897.

CHAP. 218.

(This act amended § 92 above as follows:)

"SEC. 92.—NO FORFEITURE OF POLICY WITHOUT NOTICE.—No life insurance corporation doing business in this State shall within one year after the default in payment of any premium, installment or interest declare forfeited or lapsed—any policy hereafter issued or renewed and not issued upon the payment of monthly or weekly premiums, or unless the same is a term insurance contract for one year or less, nor shall any such policy be forfeited, or lapsed, by reason of non-payment when due of any premium, interest or installment or any portion thereof required by the terms of the policy to be paid, within one year from the failure to pay such premium, interest or installment unless a written or printed notice stating the amount of such premium, interest, installment, or portion thereof, due on such policy, the place where it

shall be paid, and the person to whom the same is payable, shall have been duly addressed and mailed to the person whose life is insured, or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last known post office address in this State, postage paid by the corporation, or by any officer thereof, or person appointed by it to collect such premium, at least fifteen and not more than forty-five days prior to the day when the same is payable. The notice shall also state that unless such premium, interest, installment or portion thereof, then due, shall be paid to the corporation, or to the duly appointed agent or person authorized to collect such premium by or before the day it falls due, the policy and all payments thereon will become forfeited and void except as to the right to a surrender value or paid-up policy as in this chapter provided. If the payment demanded by such notice shall be made within its time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment; and no such policy shall in any case be forfeited or declared forfeited, or lapsed, until the expiration of thirty days after the mailing of such notice. The affidavit of any officer, clerk, or agent of the corporation, or of anyone authorized to mail such notice that the notice required by this section has been duly addressed and mailed by the corporation issuing such policy shall be presumptive evidence that such notice has been duly given. No action shall be maintained to recover under a forfeited policy, unless the same is instituted within one year from the day upon which default was made in paying the premium, installment, interest or portion thereof for which it is claimed that forfeiture ensued.

SEC. 3. This act shall take effect immediately."